Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS,
CLERK

80-1635

No.

In the Supreme Court of the United States

October Term, 1980

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, contrary to the decisions of three federal circuit courts of appeals, Petitioner Westinghouse Electric Corporation, violated section 8(a)(3) of the National Labor Relations Act when it imposed more severe discipline on union stewards than on other employees for participating in a strike in breach of no-strike, mandatory grievance and arbitration provisions of a collective bargaining agreement.

(Answered in the affirmative by the court below, with one judge dissenting in relevant part. Answered in the affirmative by the National Labor Relations Board.)

PARTIES TO PROCEEDING BELOW

The parties to the proceeding below were Westinghouse Electric Corporation (hereinafter referred to as "Westinghouse" or "Petitioner"), the National Labor Relations Board (hereinafter referred to as the "NLRB", the "Board", or "Respondent"), and the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (hereinafter referred to as the "IUE" or the "Union").

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OPINION IN THE COURT BELOW

Petitioner seeks review of an order of the United States Court of Appeals for the District of Columbia Circuit in the consolidated cases of *Westinghouse Electric Corporation v. National Labor Relations Board* and *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC v. National Labor Relations Board,* Nos. 79-1862 and 79-1707 (App. 2a). The case came before the court of appeals by way of petitions for review and cross-application for enforcement of the decision and order entered by the NLRB in *Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers,* 243 NLRB No. 44 (1979) (App. 9a).

STATEMENT OF JURISDICTION

The court of appeals entered the order for which review is sought on December 5, 1980. Westinghouse timely filed a petition for rehearing and suggestion for rehearing en banc, but these petitions were denied on January 14, 1981. (App. 34a, 35a). Westinghouse then filed a petition for stay of the mandate, which was granted by the court of appeals on March 6, 1981, to last until April 1, 1981. (App. 36a).

This Petition for Certiorari is filed pursuant to 28 U.S.C. §1254, which provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTORY PROVISION INVOLVED

This case involves section 8 (a) (3) of the National Labor Relations Act (hereinafter the NLRA or the Act), 29 U.S.C. §158(a) (3):

"Sec. 8(a) It shall be an unfair labor practice for an employer. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

STATEMENT OF THE CASE

This case involves a strike which occured at Westinghouse's plant at Glassport, Pennsylvania, on November 4, 1977, in violation of the no-strike, mandatory grievance and arbitration provisions of the collective bargaining agreement between Westinghouse and its employees' bargaining representative, the IUE.

The strike erupted out of a series of disputes between plant management personnel and local union steward, Howard Slonaker. The first problem arose on November 3, 1977, when Slonaker was not permitted to attend a meeting at which management personnel advised a rank and file employee, Philomena Smarra, and another local union steward, Clyde Pierce, of a disciplinary decision that had been made with respect to Smarra's deficient work. On the morning of November 4, 1977, Slonaker demanded time off from his duties as a first shift welder so that he could assist another union steward, Charles Kurta, in preparing a grievance on behalf of Smarra related to the events of the previous day. Slonaker's request for time off was denied because he was needed to perform emergency welding work; however, Westinghouse did allow union steward Pierce to take time off, along with Kurta, to prepare the grievance.[1]

Despite the fact his request for time off had been denied, Slonaker left his job and met with Kurta and Pierce in the plant lunch room concerning the Smarra grievance. During this period, management personnel directed Slonaker several times to return to work, but he insisted on assisting with the grievance form. Finally, the plant manager told Slonaker that if he did not go to work he would be suspended.

During the lunch break, all the first shift employees assembled in the plant parking lot for a meeting conducted by the stewards, Slonaker, Kurta and Pierce. Slonaker related their view of the events of the previous day and that morning.

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[1]Kurta and Pierce were granted time off from 8:00 A.M. to 11:30 A.M. to fill in a 4" by 6" grievance form.

Upon hearing the stewards' explanation, the employees began shouting they were not going to return to work. The stewards made no efforts to dissuade the employees from striking and neither the stewards nor any of the other first shift employees returned to work that day. Indeed, none of the second shift employees reported for work either.

Slonaker, Kurta and Pierce returned to the plant, but they did not return to work or even punch in on the time clock. Their only purpose in returning was to confront management over the strike and to present the Smarra grievance to the plant manager. Management personnel asked the three stewards to get the employees back to work, to return to work themselves, or to vacate the plant. Rather than return to work, Slonaker, Kurta and Pierce left the premises and joined the other striking employees.

Since the strike violated the provisions of the collective bargaining agreement, Westinghouse imposed one-day suspensions on all participating rank and file employees. The stewards, however, were disciplined more severely. Westinghouse suspended each of the first-shift stewards, Slonaker, Kurta and Pierce, for three days for their participation in the strike, as well as for their leadership, and refusal to take any measures to prevent or terminate the walkout.[2]

On November 7, 1977, the Union filed unfair labor practice charges against Westinghouse. On December 30, 1977, the Regional Director of the NLRB issued a complaint charging, *inter alia*, that Westinghouse had violated section 8(a)(3) of the

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[2]Westinghouse contended before the NLRB and in the court of appeals that stewards Slonaker, Kurta and Pierce encouraged and fomented the strike. However, review is sought here simply on the basis of the undisputed facts that these three union officials participated in the work stoppage.

Westinghouse also imposed three day suspensions on three other persons, two of whom were stewards (Ron Shavers, Nicholas Caputo) and one of whom was reasonably believed to be a steward at the time of the strike (Hugh Piccini). The record discloses sharp factual disputes among the parties as to whether Shavers and Caputo participated in the strike and whether Piccini was a steward. Therefore, Westinghouse does not seek review of the court of appeals' order insofar as it concerns Shavers, Caputo or Piccini.

Act by imposing harsher discipline on the union stewards than on rank and file employees for their participation in the strike.[3] After an evidentiary hearing, an Administrative Law Judge resolved the case in favor of the Regional Director and against Westinghouse.

Westinghouse filed exceptions to the decision of the Administrative Law Judge, but the NLRB affirmed his rulings, findings of facts and conclusions of law.

Pursuant to Sections 10(e) and 10(f) of the NLRA, 29 U.S.C. §160(e) and (f), the Union and Westinghouse petitioned the United States Court of Appeals for the District of Columbia Circuit to review the NLRB's order. The Board filed a cross-application for enforcement of its order.

The cases were consolidated and, following the submission of briefs and oral argument, the court of appeals, with Circuit Judge MacKinnon dissenting, sustained the Board's order, including the ruling that Westinghouse violated section 8(a) (3) of the Act by disciplining stewards Slonaker, Kurta and Pierce more severely than other employees for participating in a contract breaching strike. Westinghouse seeks to have this ruling reviewed.[4]

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[3]The Regional Director also charged that Westinghouse violated sections 8(a)(1) and (5) of the Act by refusing to permit steward Slonaker to attend the informational meeting with steward Pierce and employee Smarra and by not permitting Slonaker time off to write up a grievance, along with stewards Kurta and Pierce.

[4]Although several issues were presented in the court of appeals, Petitioner only seeks review of that part of the court's order concerning the discipline of the three first-shift stewards relative to the rest of the employees. See notes 2 and 3, *supra*.

ARGUMENT

In holding that Westinghouse committed an unfair labor practice by taking stronger disciplinary measures against the three union stewards, Slonaker, Kurta and Pierce, for their participation in the prohibited strike, the NLRB expressly followed a rule of decision it first announced in *Precision Castings Company*, 233 NLRB 183 (1977) (hereinafter *Precision Castings*), that such disparate discipline of union officials constitutes a *per se* violation of section 8(a) (3) of the Act[5]. The United States Court of Appeals for the District of Columbia Circuit granted the application for enforcement of the Board's order, without opinion, and thereby approved the rule of *Precision Castings*.[6]

Other federal circuit courts of appeals, however, have rejected the view that union officials may not be subjected to stronger discipline than other employees for participating in a strike which violates no-strike or mandatory grievance and arbitration provisions of a collective bargaining contract. Indeed, the order of the court of appeals for the District of Columbia Circuit in the instant case stands in direct conflict with decisions of the courts of appeals for the Third, Seventh and Eighth Circuits. See *Gould, Inc. v NLRB*, 612 F.2d 728 (3d Cir. 1979); *Indiana & Michigan Electric Company v. NLRB*, 599 F.2d 227 (7th Cir. 1979); *NLRB v. Armour-Dial Inc.*, 638 F.2d 51 (8th Cir. 1981).

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[5]The Board's decision and order states: "We agree with the Administrative Law Judge that, applying the rationale of Precision Castings Company, Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation, 233 NLRB 183 (1977), the more severe penalties imposed on the [union stewards] violated Sec. 8(a)(3) of the Act. See also Gould Corporation, 237 NLRB No. 124 (1978)..." (App. 9a, 10a).

[6]The appeals below were heard by Chief Judge Wright, Circuit Judge MacKinnon and District Judge Gasch (sitting by designation). The court of appeals' order was announced per curiam and without opinion, although Judge MacKinnon filed a memorandum opinion, concurring in part and dissenting, inter alia, on the issue of the selective discipline of the stewards.

The decision of the appellate court here also runs contrary to fundamental principles of contemporary national labor policy encouraging parties to avoid economic warfare by favoring compliance with no-strike obligations and preferring arbitration as a forum of dispute resolution. *See, e.g., Gateway Coal Co. v. UMW*, 414 U.S. 368 (1973); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the *Steelworkers Trilogy*,[7] *Textile Workers v. Lincoln Mills*, 353 U.S 448 (1957).

Every Other Federal Circuit Court Of Appeals Which Has Considered The Issue Whether An Employer May Impose Stronger Discipline On Union Officials Than On Rank And File Employees For Participation In An Unlawful Strike Has Reached A Conclusion Contrary To The Decisions Of The NLRB And The Court Of Appeals For The District Of Columbia In The Instant Case

Three other federal circuit courts of appeals have considered the question whether stronger discipline may be imposed on union officials for participating in an unlawful strike than is imposed on other striking employees. *Gould, Inc. v. NLRB, supra; Indiana & Michigan Electric Co. v. NLRB, supra; NLRB v. Amour-Dial Inc., supra.* In each case the court rejected the NLRB's *Precision Castings* rule and upheld the discipline imposed on the striking union officials.

Indiana & Michigan Electric Co. v. NLRB, supra, (hereinafter *Indiana & Michigan Electric*), involved a work stoppage by public utility employees in violation of a no-strike commitment in their collective bargaining agreement. Although the employer only issued written warnings to rank-and-file participants in the strike, several union stewards and a union officer who had walked off the job with the other strikers

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[7]United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

were suspended. The union filed unfair labor practice charges alleging that the disciplinary action against the union officials constituted a violation of section 8(a) (3) of the Act.[8] The charges were sustained by an Adminstrative Law Judge and by the NLRB on the basis of the *Precision Castings* rule. The court of appeals for the Seventh Circuit, however, denied enforcement of the NLRB's order.

In *Indiana & Michigan Electric,* at 229, the court recognized that the standards for determining violations under section 8(a) (3) of the Act were set forth by the Supreme Court of the United States in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967):

> "First, if it can be reasonably concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is comparatively slight, an anti-union motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct..."

Since the *Precision Castings* rule relied on by the NLRB in *Indiana & Michigan Electric* is premised solely on the first

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[8]In *Indiana & Michigan Electric*, as in the instant case, the harsher discipline of the union officials was found by the NLRB to be a violation of section 8(a)(1) of the Act as well. For purposes of this petition, however, the finding with respect to section 8(a)(1) is not significant. The reason for this was well explained by the Seventh Circuit in *Indiana & Michigan Electric:*

> "A violation of section 8(a)(3) constitutes a derivative violation of section 8(a)(1) when, as is alleged here, the employer's acts served to discourage union membership or activities. The opinion of the ALJ does not reflect a determination that there was an independent violation of section 8(a)(1) and the Board does not contend that we should treat the two provisions separately. The same proof is therefore required to establish a violation of either section." 599 F.2d at 229, fn. 2.

prong of the *Great Dane* test, the Seventh Circuit was called upon to decide whether the selective discipline of the union officials who participated in the strike was "inherently destructive of important employee rights". 599 F.2d at 230.

After ca eful consideration, the Seventh Circuit decided that the disparate discipline of the union officials was not a *per se* unfair labor practice because it did not impair some right or restrict some legitimate activity of union officials, thereby discouraging members from holding union office. Rather, the court reasoned:

> "[Such discipline] at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.
>
> In arguing that status as a union official may not be the sole criterion for differentiating among employees in meting out discipline, the Board somewhat misstates the issue. The more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank and file."

599 F.2d at 230

The Seventh Circuit further observed that the *per se* rule first announced in *Precision Castings* constituted a sharp departure from a long line of prior Board decisions recognizing the validity of disciplining union officials more severely than rank-and-file members for participating in unprotected activity. The court's analysis demonstrated *Precision Castings* and its progeny "to be erroneous" and thus, *Indiana & Michigan Electric* concluded:

> "Differentiating between union officers and rank and file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any pro-

> tected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights."

599 F.2d at 232.

Gould, Inc. v. NLRB, supra, (hereinafter *Gould),* is another appellate decision upholding the right of an employer to single out for discipline union officials who participate with other union members in an illegal work stoppage. The case arose out of a wildcat strike which occured at Gould's Philadelphia plant in violation of an express no-strike clause in the labor agreement. Approximately fifty employees, including one union steward, participated in the walkout. Following an investigation, however, Gould singled out the steward for discharge. The union responded by filing unfair labor practice charges which were eventually upheld by the NLRB in reliance on *Precision Castings.* The United States Court of Appeals for the Third Circuit vacated the Board's order.

Noting that the steward was disciplined not because of his union office as such, but rather because he participated in an illegal strike and failed to take steps to halt it,[9] the Third Circuit in *Gould* held that such selective discipline was not inherently prejudicial to important employee rights and therefore not an unfair labor practice in the absence of proof of anti-union motivation.

In reference to *Indiana & Michigan Electric,* the *Gould* court stated:

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[9]The collective bargaining agreement involved in *Gould* contained a provision requiring union officials to take positive steps to terminate illegal work stoppages. But since the labor agreement in *Indiana & Michigan Electric* had no such clause and since the Third Circuit's decision in *Gould* was squarely predicated on its whole-hearted approval of the rationale and holding of the Seventh Circuit, it is clear that the "affirmative duty" to make efforts to halt illegal strikes was not central to the Third Circuit's analysis in *Gould.*

> ". . . [W]e concur with the court's reasoning in *Ind. & Mich. Elec. Co.* that logically no prejudice to employee rights can result where the employee is merely deterred from engaging in illegal activity and from breaching a contractual obligation, neither of which he has a *right* to do. *As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages* or to *repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of 'union' activity."*

612 F.2d at 733 (emphasis added).

The most recent case following the line of authority established by *Gould* and *Indiana & Michigan Electric* is *NLRB v. Armour-Dial, Inc., supra,* (hereinafter *Armour-Dial*). In that case a meat products manufacturer suspended the members of a local union executive committee for participating in a strike related to the union's refusal to handle the products of a certain meat processor who was engaged in a dispute with a sister local of the union; the strike was a clear violation of the union's no-strike obligation. Although the NLRB found the discipline to constitute an unfair labor practice, the United States Court of Appeals for the Eighth Circuit denied enforcement of the Board's order and squarely rejected the rule of *Precision Castings* on the strength of the reasoning in *Gould* and *Indiana & Michigan Electric.*

In the instant case it is beyond cavil that stewards Slonaker, Kurta and Pierce participated in the unlawful strike. The record shows they organized and conducted the parking lot meeting, made no attempts to dissuade the other employees from striking and, at the very least, joined the strikers by refusing to work themselves on November 4.[10] In view of

[10]Indeed, counsel for the IUE conceded at oral argument before the court of appeals that Slonaker, Kurta and Pierce had participated in the unlawful work stoppage.

Gould, Indiana & Michigan Electric, and *Armour-Dial,* the harsher discipline imposed on these three cannot be considered inherently destructive of important employee rights and therefore cannot constitute a *per se* violation of section 8(a)(3).

By enforcing the NLRB's order, which relied on the discredited *Precision Castings* rule,[11] the court of appeals for the District of Columbia Circuit has created a conflict among the federal courts of appeals on an important question of federal labor law. Thus, an employer, such as Westinghouse, who imposes stronger discipline on union officials than on rank-and-file members for participating in an unlawful strike may or may not be committing an unfair labor practice depending on the court in which the charges are ultimately resolved.

The Order Of The Court Of Appeals For The District Of Columbia Circuit And The Rule Of Law On Which It Relies Undermine Fundamental Principles Of National Labor Policy

As between the conflicting decisions, the better view is expressed in *Gould, Indiana & Michigan Electric,* and *Armour Dial.* The rationale of those decisions advances fundamental principles of national labor policy by providing employers with an effective means of ensuring compliance with contractual no-strike obligations.

This Court has recognized on numerous occasions that the emphasis of modern labor legislation has been to encourage collective bargaining and administrative techniques for the peaceful resolution of industrial disputes. *See, e.g., Gateway Coal Co. v. UMW, supra,* (hereinafter *Gateway Coal*); *Boys*

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[11]Even though the problem of selectively disciplining union officials for participating in unlawful strikes arises frequently, the NLRB itself has been sharply divided over the doubtful validity of *Precision Castings. See and compare,* Babcock & Wilcox, 249 NLRB No. 99 (1980); Rogate Industries, Inc., 246 NLRB No. 143 (1979); Gould Corporation, 237 NLRB 881 (1978), rev'd 612 F.2d 728 (3d Cir. 1979); *with* Chrysler Corp., 232 NLRB 466 (1977); Russell Packing Co., 133 NLRB 194 (1961); University Overland Express, 129 NLRB 82 (1960); Stockham Pipe Fitting Co., 84 NLRB 629 (1949).

Markets, Inc. v. Retail Clerks Union, supra, (hereinafter *Boys Markets*). Accordingly, the Court's decisions promote arbitration as a forum for dispute resolution favored over economic warfare. In the *Steelworkers Trilogy,* for example, the Court enunciated the well-known presumption of arbitrability for labor disputes:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960); see also *Gateway Coal; Boys Markets; Textile Workers v. Lincoln Mills, supra.*

As a corollary to the preference for arbitration, the Court has also acknowledged that the *quid pro quo* for an employer's agreement to submit disputes to arbitration is a no-strike obligation, express or implied, on the part of the union. *Gateway Coal; Boys Markets.* Obviously, without a no-strike assurance, there would be little or no incentive for management to agree to arbitration.

Regardless of whether a no-strike obligation is expressly stated in the contract or implied from a mandatory grievance and arbitration provision, federal labor policy dictates that such obligation be honored and enforced. The error in the NLRB's *Precision Castings* rule and the order of the court of appeals for the District of Columbia Circuit in this case is that they deprive the employer of a practical and effective means of protection against conduct in repudiation of a no-strike obligation.

A strike in violation of the contract has an adverse economic impact on the employer. Not only are immediate orders lost, but future business may be affected if customers switch to other employers who can deliver regularly and on time due to more stable labor relations. For this reason, it is clearly in the employer's best interests to bring about an end to an illegal

strike as soon as possible and, moreover, to be able to deter such unlawful conduct in the first place.

One remedy available against a work stoppage in violation of a no-strike obligation is an injunction under *Boys Markets*. However, such relief is not necessarily available in all situations. *See, e.g., Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397 (1976). A more significant limitation with respect to this type of relief is that an injunction only returns the employer-employee relationship to the status quo. Although a *Boys Markets* injunction will halt an illegal strike once started, that remedy has little deterrent value to prevent the stoppage from beginning.

A suit for money damages is also of limited value to the employer hit with a strike in breach of the contract. A damage remedy does not serve the employer's objective of bringing about an immediate end to the strike. Nor does it necessarily serve as an effective deterrent. Realistically, an action for damages prosecuted during or after a labor dispute can frequently aggravate the industrial strife and exacerbate antagonism between labor and management. *Boys Markets* at 249. The practical disadvantages of a prolonged strike and expensive and protracted litigation severely restrict the usefulness of a damages remedy.[12]

[12]A number of federal courts have held that individual union officers and members are currently immune from damage actions for participating in an unlawful strike. *See* Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) *and compare with* Sinclair Oil Corp. v. Oil, Chemical and Atomic Workers, 452 F.2d 49 (7th Cir. 1971); United Steelworkers of America v. Lorain Division of Koehring Co., ___ F.2d ___, 103 L.R.R.M. 2627 (6th Cir. 1980); *but see* New York United Teachers v. Thompson 459 F.Supp. 677 (N.D.N.Y. 1978); Certain-Teed Corp. v. United Steelworkers of America, 484 F.Supp. 726 (M.D. Pa. 1980); Alloy Cast Steel Co. v. United Steelworkers of America, 70 F.R.D. 687 (N.D. Ohio 1976), 429 F.Supp. 445 (N.D. Ohio 1977); DuQuoin Packing Co. v. Local P-156, Amalgamated Meatcutters and Butcher Workmen of America, 321 F.Supp. 1230 (E.D. Ill. 1971). The issue of individual liability for unauthorized conduct in breach of a collective bargaining agreement is now awaiting decision before this Court. Complete Auto Transit v. Reis, 614 F.2d 49 (7th Cir. 1980), cert. granted ___ U.S. ___, 66 L.Ed. 2d 127 (1980).

(continued)

Finally, the employer is left with discipline as a means of combatting prohibited strikes. Most commonly this discipline will be in the form of suspension or discharge. Under circumstances such as presented here, mass discharges or suspensions are clearly unfeasible and conflict with the employer's desire to resume production as soon as possible. The large number of strikers and the fact that many positions require a high degree of skill would force the employer to increase his losses as productive operations remained closed for the length of the suspensions or, in the case of discharges, for the time to hire and train replacements.

Discipline of participating union officials, on the other hand, has both an immediate and prophylactic effect, while avoiding the problems found in the other remedies. Focusing discipline on union officials who repudiate contractual no-strike obligations helps the employer bring an end to the illegal strike and resume production as soon as possible yet also serves as a future deterrent.

In the context of a contractually prohibited strike, discipline for participating union officials is an effective general deterrent against employees repudiating their no-strike obligations because the conduct of union stewards and other such union officials close to the scene has a strong influence on the behavior of the rank-and-file. Participation by a union steward in an unlawful strike may lead other employees to believe the strike is sanctioned by the union and to join in. Conversely, a

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(continued)

Under Carbon Fuel Co. v. UMW, 444 U.S. 212 (1979), union liability for a strike in breach of the contract must be proven according to common law standards of agency. Thus, assuming only local union officials participated in an unlawful strike, the effect of these decisions is that only the local union is exposed to a damage remedy. But, as pointed out in 3 *Utah L. Rev.* 493, 500 (1980):

> "... Even if recovery from the local union is permitted, that remedy is of little consolation if the local union is judgment proof, as it likely is. *Thus, the damage remedy for violation of a no-strike clause becomes, in many cases, illusory and a minimal deterrence.*" (emphasis added).

union steward's refusal to join an illegal walkout may prevent the unauthorized actions of renegade strikers from infecting the rest of the work force.

Discipline directed at striking stewards will create an incentive for the stewards to honor the no-strike obligations of the contract. Because of the influence exerted by the stewards' example, the salutary effect of the stewards' discipline will also discourage wider repudiation of contractual commitments by the rest of the union membership.

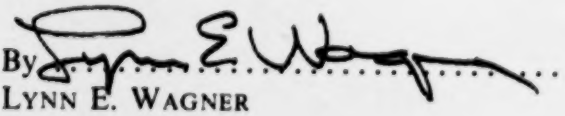
A strike in breach of a contractual commitment to arbitrate disputes flies in the face of the basic tenets of our labor laws. Unless the employer has an effective remedy to protect himself from such conduct by the union and its members, the value of the entire collective bargaining agreement is dissipated and the incentive to enter such an arrangement is destroyed.

It follows that, as a practical and effective means of protection available to the employer, the right to impose stronger discipline on union officials for participating in an unlawful strike advances the goal of industrial peace by encouraging the resolution of disputes through contractual grievance and arbitration procedures. This is the rationale which justifies the decisions in *Gould, Indiana & Michigan Electric* and *Armour-Dial.* To the extent that the orders of the United States Court of Appeals for the District of Columbia Circuit and the NLRB in the instant case are contrary and deny the employer such a right, they undermine the fundamental principles of national labor policy and should be reversed.

CONCLUSION

The order of the United States Court of Appeals for the District of Columbia Circuit is based on a discredited *per se* rule which conflicts with decisions of three other federal courts of appeals concerning the same issue and contradicts fundamental principles of national labor policy as expressed through decisions of this Court. The problem of selectively disciplining union officials for participation in prohibited strikes recurs often, but under the current state of the law whether an employer who imposes such discipline will be held to have committed an unfair labor practice depends on the court of appeals in which the matter is eventually decided. This important question of federal labor law should be settled by the United States Supreme Court and therefore, Petitioner Westinghouse Electric Corporation respectfully requests this Court to grant certiorari.

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[No Opinion]

No. 79-1707 **September Term, 1980**

INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO-CLC, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
WESTINGHOUSE ELECTRIC CORPORATION, *Intervenor*

No. 79-1862

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

United States Court of Appeals
for the District of Columbia Circuit
FILED Dec. 5, 1980
GEORGE A. FISHER
CLERK

Petitions to Review and Cross-Application to Enforce an Order of the National Labor Relations Board.

Before: WRIGHT, Chief Judge, MacKINNON, Circuit Judge, and GASCH,* District Judge.

ORDER

These causes came on to be heard on petitions to review and a cross-application to enforce an order of the National Labor Relations Board and were argued by counsel. While the issues presented occasion no need for an opinion, they have

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. §292(a) (1976).

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

been accorded full consideration by the court. *See* Local Rule 13(c).

The order of the National Labor Relations Board is supported by substantial evidence in the record taken as a whole. *See Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1961). Moreover, this court finds that the Board's order is otherwise free from reversible legal error.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the petitions for review are hereby denied, and the cross-application for enforcement is hereby granted.

Per Curiam

For the Court

GEORGE A. FISHER
Clerk

Circuit Judge MacKinnon concurs in part in and dissents in part from the foregoing order, for the reasons set forth in his attached memorandum.

No. 79-1707 & 79-1862 — *Electrical Workers v. NLRB & Westinghouse Electric*

MacKINNON, *Circuit Judge* submitted his views in the following memorandum concurring in part and dissenting in part.

The Court's order affirms findings that Westinghouse violated §8(a) of the National Labor Relations Act in three respects. *First*, violating §8(a)(1) and (5) by excluding a *division* steward from a meeting in which a company foreman informed an employee, in the presence of a lower echelon *section* steward, of a decision to suspend the employee for three days on the ground of shoddy workmanship, despite an alleged company practice of permitting a higher echelon *division* steward to attend on such occasions. *Second*, again violating §8(a)(1) and (5) by refusing to give the division steward time off to write a grievance petition on behalf of a suspended employee without proof that the time off would "cause serious interference with operations" and without permitting the steward "to leave his job as promptly as possible" as the collective bargaining agreement allegedly required. *Third*, violating §8(a)(1) and (3) by, while suspending employees for engaging in a wildcat strike, adjudging additional suspensions (above those imposed upon to all striking employees) to the employees who were union stewards.

(1) The Meeting with the Employee.

The *first* alleged unfair labor practice is not supported by substantial evidence in the record. The Board has concluded that Westinghouse unilaterally changed a practice involving working conditions. That alleged practice was to permit the attendance of the division steward at a meeting to *inform* an employee of the imposition of discipline. To claim the existence of a *practice* is to implicitly recognize that it is not required by the collective bargaining contract. But, before such a practice can be deemed a condition of employment it must have become established through a regular and consistent pattern of employer conduct. *See, e.g., NLRB v. Nello Pis-*

toresi & Sons, Inc., 500 F.2d 399, 401 (9th Cir. 1974); *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 214 (8th Cir. 1965). The record evidence does not support a finding that the claimed practice had been so established. The testimony of record that access to *similar* meetings had been allowed on prior occasions, even though over a considerable period of time, is insufficient to support a finding that the practice was established sufficiently to make a violation thereof an unfair labor practice. The prior instances in which a *division* steward usually attended meetings between management and employees involved circumstances where a hearing was held to determine *whether* disciplinary action *should* be taken. The meeting here was of a different character. It did not involve a hearing since the employee was merely called in to inform her that she *would* be disciplined for shoddy workmanship. A vast difference exists between a meeting called to inform an employee of disciplinary action and a hearing called to determine whether discipline would be imposed. The record does not indicate that the meeting here was of the latter type. Also, for what it may be worth, there is no showing of anti-union bias.

(2) Denial of Time Off to Prepare Grievance.

As to the *second* grievance — not allowing the steward time off to prepar the grievance, the Administrative Law Judge found on the record that the company could have let the steward off for this purpose without interfering with the alleged emergency. In my view this finding is supported by substantial evidence in the record.

(3) Additional Discipline for Stewards.

As to the propriety of the company imposing additional punishment upon the stewards for engaging in the strike, my views follow the reasoning of the Third Circuit decision in *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979). This case holds that union stewards engaging in unfair labor practices may receive additional discipline over rank and file union members engaging in substantially the same violation. *Gould* held that it was not an unfair labor practice for the employer to

single out for disciplinary discharge a union steward who participated with rank and file union members in an illegal work stoppage where the steward failed to discharge his contractual obligation as a union officer to take steps to terminate that work stoppage. The strike violated a no-strike clause in the collective bargaining agreement which provided that such illegal strikers were subject to disciplinary action, including discharge. The agreement also required union officials to take positive steps to terminate illegal work stoppages. *Id.* at 730-31 n.3. The company singled out one Moran, a steward, from among 50 illegal strikers and discharged him because he failed to carry out his duty as a steward to attempt to restore order and terminate the work stoppage as required by the collective bargaining agreement and also because he had participated in a similar strike some three years earlier.

Such cases require a determination as to whether such discriminatory punishment was directed against an employee on the basis of his or her holding union office, such punishment being allegedly contrary to §8(a)(3). *Precision Casting Co.*, 233 N.L.R.B. 184 (1978) (employer in disciplining employees cannot hold union stewards to higher degree of responsibility). The additional punishment of three of the stewards disciplined here — Slonaker, Pierce and Kurta — was not imposed simply because they were stewards but because of their activities as stewards. I would refuse to follow the Board's decision in *Precision Casting Co.* and would hold that the company was within its rights in disciplining stewards Slonaker, Pierce and Kurta. As to stewards Shavers, Caputo and Piccini I would hold that the finding that their disparate discipline was improper is supported by substantial evidence. Shavers was out of the plant and did not strike. Caputo called in sick and Piccini was not a steward at the relevant time.

As to the other stewards, Slonaker, Pierce and Kurta, they voluntarily participated in the unlawful strike. As stewards they may be held to a higher standard and punished more severely than would a rank and file employee engaging in the same activity.

Strikes carried out in violation of a no-strike provision in a collective bargaining agreement are not protected by the Act and discharge of employees who engage in such strikes is not an unfair labor practice. *Food Fair Stores, Inc. v. NLRB*, 491 F.2d 388, 395 (3d Cir. 1974). An employer need not fire all illegal strikers but may pick and choose which participants will be discharged as long as the basis for so doing is not union related.

Ind. & Mich. Elec. Co. v. NLRB, 599 F.2d 227 (7th Cir. 1979) held, contrary to the Board's present position on this issue, that disciplining union stewards more severely than rank and file employees for participation in an unlawful strike was not a violation of the Act.

> *The more severe punishment was not based merely on the officials' status but upon their breach of the higher responsibility that accompanies that status, a breach that makes their misconduct more serious than that of the rank-and-file.*
>
> * * *
>
> Differentiating between union officers and rank-and-file in meting out discipline for participating in a clearly illegal strike did not penalize or deter the exercise of any protected employee right. We believe the employer was entitled to take into account the union officials' greater responsibility and hence greater fault, and that the resulting different treatment of union officials could not be reasonably considered inherently destructive of important employee rights.

599 F.2d 230, 232-233, quoted in *Gould, Inc. v. NLRB*, 612 F.2d at 728 (emphasis added, footnote omitted). The validity of their punishment is justified by the breach of their higher responsibility as stewards. The collective bargaining agreement in the present case, while not imposing an express duty on stewards to refrain from striking, did provide that "the Union and the locals . . . will not cause . . . their members to cause or take part in any strike . . . during the life of this agreement." (IV

App. 1263). The three stewards aided and abetted the violation of this provision by the Union members and personally engaged in the strike themselves.

(4) The Character of the Strike.

I would also sustain the Board in declining to decide whether the wildcat strike was a lawful protest strike. The union contends that the NLRB erred in not finding the work stoppage to be lawful. However, the General Counsel had not injected that issue into the proceedings. The General Counsel charged only that the treatment of the stewards and rank and file employees was improper; he never alleged that the discipline was completely void. The complaint had never been enlarged over the charges of the General Counsel and therefore the Board was powerless to rule upon the union's further claim that the work stoppage was legal and that *any* discipline relating thereto was an unfair labor practice. A charging party cannot enlarge the complaint over the General Counsel's objection. In any event the stawards' and employees' reaction to the acts by the company was so grossly disproportionate to the provocation that the strike should not be held to have been a lawful protest strike.

243 NLRB No. 44

FJPT
D-5239
Glassport, PA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WESTINGHOUSE ELECTRIC CORPORATION

and

Case 6-CA-10695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 601, AFL-CIO

DECISION AND ORDER

On September 20, 1978, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party filed cross-exceptions and supporting briefs.

The Board has considered the record and the attached Decision[1] in light of the exceptions and briefs and has decided

[1]The following inadvertent errors in the Administrative Law Judge's Decision are hereby corrected: The name "Caputa" is changed to "Caputo" and the name "Gibson" is changed to "Gilson."

to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

[2]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Also, as did the Administrative Law Judge, we make no findings regarding whether Respondent's refusal to permit the division steward to attend the disciplinary meeting constituted an independent violation of Sec. 8(a)(1). Accordingly, we do not adopt the Administrative Law Judge's comments in fn. 9 of his Decision.

[3]We agree with the Administrative Law Judge that, applying the rationale of *Precision Castings Company, Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation*, 233 NLRB 183 (1977), the more severe penalties imposed on the six discriminatees violated Sec. 8(a)(3) of the Act. See also *Gould Corporation*, 237 NLRB No. 124 (1978). Moreover, we note that the Administrative Law Judge correctly found that the discriminatees received harsher penalties solely because they held the position of steward. (One discriminatee stated that at the time of the work stoppage he was no longer a steward, but he received the harsher punishment because Respondent believed he was a steward.) In light of its having meted out severer discipline to stewards who were not even present at the plant during the work stoppage, Respondent cannot legitimately contend that its disciplining of stewards was based on any alleged failure by the stewards to urge other employees to return to work. [Accordingly, it is clear that Respondent violated Sec. 8(a)(3) by imposing harsher discipline on six employees solely because they held, or were believe to have held the position of union steward.] See also *Pontiac Motors Division, General Motors Corporation*, 132 NLRB 413 (1961).

Members Penello and Truesdale, who dissented in *Gould Corp.* and indicated therein their disagreement with the Board's decision in *Precision Castings*, would adopt the Administrative Law Judge's finding that the more severe penalties imposed by Respondent on the six union stewards violated Sec. 8(a)(3) of the Act only because it is clear that: (1) Steward Slonaker, Pierce, and Kurta made a good-faith effort to get the striking employees to return to work and did not voluntarily participate in the strike; (2) Steward Shaver was working on a "road job" rather than at the plant on the day of the strike and, upon being informed of the strike, he continued working; (3) Steward Caputo was legitmately absent from work on the day of the strike and never participated in, nor lent his support to, the stirke; and (4) Steward Piccini had ceased to be a steward prior to the day of the strike, and the sole reason that he was more severely disciplined was because Respondent thought he was still a steward.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Westinghouse Electric Corporation, Glassport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. July 3, 1979

.....
John H. Fanning, *Chairman*

.....
John A. Penello, *Member*

.....
John C. Truesdale, *Member*

NATIONAL LABOR
(SEAL) RELATIONS BOARD

MEMBER JENKINS, concurring in part and dissenting in part:

I agree with my colleagues that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to permit Union Steward Howard Slonaker to be present when employee Philomena Smarra received notice of a disciplinary action, and by denying Slonaker time off so that he might write up Smarra's grievance. I also agree with the majority view as expressed in its footnote 3 that the six disciminatees received 2 additional days of disciplinary layoff beyond the 1 day imposed on all other employees soley because they were, or were believed to be, union stewards. However, I would go further than my colleagues and find that the entire 3 days of discipline borne by the stewards were imposed in violation of Section 8(a)(3) of the Act.

The record shows that the Administrative Law Judge, on several occasions during the hearing, asked the General Coun-

sel if he wished to place the legality of the November 4 work stoppage in issue. The General Counsel refused to do so. In fact, he is willing to concede, for the purposes of this case, that the strike was illegal, presumably on the theory that it occurred in violation of the contractual no-strike clause. The Administrative Law Judge declined to rule on the strike's legality specifically because of the General Counsel's posture on the issue. However, he noted in his Decision that the strike was a spontaneous response to Respondent's unfair labor practices with respect to Steward Slonaker and therefore could not be deemed to be illegal.

I agree with the Administrative Law Judge's characterization of the strike. I do not believe that the Board is precluded by even a General Counsel's concession from making a finding on a material matter which was of necessity fully litigated and where an exception was filed, here by the Charging Party. The facts as detailed in the Administrative Law Judge's Decision and then evaluated in his footnote 31 lead directly to the conclusion that Respondent's employees staged a brief work stoppage to protest unfair labor practices.

I would grant the Charging Party's cross-exception. Since the work stoppage was protected, the entire disciplinary layoff imposed on the six union stewards, including the first day shared with the rank-and-file employees, was violative of Section 8(a)(3). The Board's Order should therefore provide for 3 days' backpay for the stewards rather than the 2 days' reimbursement provided for in the Administrative Law Judge's recommended Order adopted by the majority.

Dated, Washington, D.C. July 3, 1979.

.....

Howard Jenkins, Jr., *Member*

NATIONAL LABOR
RELATIONS BOARD

JD-589-78
Glassport, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

WESTINGHOUSE ELECTRIC CORPORATION

and

Case 6-CA-10695

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 601, AFL-CIO

Matthew M. Franckiewicz, Esq., and *William Bevan III, Esq.*, of Pittsburgh, Pa., for the General Counsel.

Richard B. Slosberg, Esq., of Pittsburgh, Pa., for the Respondent.

James G. Mauro, Jr., Esq., of Washington, D.C., and *Theodore Goldberg, Esq.*, of Pittsburgh, Pa., for the Charging Party.

DECISION

Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: The charge filed by International Union of Electrical, Radio and Machine Workers, Local 601, AFL-CIO, herein called the Local Union, on November 7, 1977, was duly served by registered mail on Westinghouse Electric Corporation, Respondent herein, on November 7, 1977. A complaint and notice of hearing was issued on December 30, 1977. The complaint charged that Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended, herein called the

Act, in that on November 3, 1977, Respondent refused to permit Division Steward Howard Slonaker to be present while an employee was receiving notice of a disciplinary action; and on November 4, 1977, Respondent denied Division Steward Slonaker time off to leave his job for the purpose of conducting union business. Additionally, it was averred that Respondent violated Section 8(a)(3) of the Act by unlawfully suspending five union stewards and one former steward as an outgrowth of a work stoppage which occurred on November 4, 1977.

Respondent filed a timely answer, denying that it had engaged in any of the unfair labor practices alleged.

The case came on for hearing at Pittsburgh, Pennsylvania, on March 29, 30, and 31; May 30 and 31; and June 1, 1978. Each party was afforded full opportunity to be heard, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.[1]

Findings of Fact,[2] Conclusions, and Reasons Therefor

I. The Business of Respondent

Respondent, a Pennsylvania corporation with its principal office located in Pittsburgh, Pennsylvania, is engaged in the manufacture, sale, and distribution of electrical appliances and

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[1]There being no opposition thereto General Counsel's motion to correct the transcript is granted and the transcript is corrected accordingly.

[2]The facts found herein are based on the record as a whole and the observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B. v. Walton Manufacturing Co., et al.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in light of the entire record. No testimony had been pretermitted.

products in various States. One facility of Respondent is its Pittsburgh Apparatus Repair Plant located in Glassport, Pennsylvania. During the 12-month period immediately preceding the issuance of the complaint and notice of hearing, Respondent has shipped goods and materials valued in excess of $50,000 from its Pennsylvania plants directly to points located outside the Commonwealth of Pennsylvania. During the same period, Respondent has purchased and received goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania for use at its Glassport, Pennsylvania, facility.

Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Local Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called International Union, of which the Local Union is a constituent local, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

First: At all times material herein Howard Slonaker was the division steward, first shift; Nicola Caputa, the subdivision steward, second shift;[3] Charles Kurta and Clyde Pierce, the section stewards, first shift; and Ronald Shaver, section steward, second shift.[4] As division steward, Slonaker was the

[3]The first shift commenced at 7:30 a.m. and ended at 4 p.m.; the second shift ran from 4 p.m. until 1 a.m. One-half hour was allowed for a lunch break.

[4]There is a dispute as to whether Hugh Joseph Picinni, the sixth alleged discriminatee, was a section steward at the time the incidents herein occurred.

highest union representative located at the Glassport Plant.[5]

Sometimes prior to November 3, 1977, Philomena Smarra, a 36-year employee, had been charged by Supervisor Charles F. Readal with having improperly wound an armature. Smarra's steward, Pierce, had insisted on a cold strip test which disclosed a defect. Whereupon Readal gave Smarra a verbal warning, although he told Pierce he could have given her 3 days off. Around November 3, 1977, a similar incident was alleged to have occurred. On the morning of November 3, 1977, Readal told Pierce that he was going to take some disciplinary action against Smarra for poor workmanship, but did not know yet what it would be. Readal said that he would let Pierce know later in the day. In the meantime, Slonaker had heard a rumor that Smarra had "fouled up" a job and her foreman was planning on disciplining her. Slonaker contacted her foreman, Readal, who responded that he had not "made up his mind." Later, Slonaker approached Glassport Plant Manager Louis M. Venters and said that he felt something was wrong with respect to Smarra and that "maybe we should hold a meeting and try to resolve it." Venters responded that he did not have time for a meeting.[6] After lunch, Slonaker again asked Readal what he expected to do about Smarra. Readal again replied that "he hadn't made up his mind." Slonaker asked, "[W]ould you be so kind as to let me know what you are planning?"

Around 3:55 p.m., Readal instructed Pierce to bring Smarra to the office. On the way to the office Smarra told "a fellow" that she "wanted Howard Slonaker and Nick Caputa in." When Pierce and Smarra arrived at the office, Readal handed a letter to Pierce and Smarra in whch Smarra had been given a 3-day suspension. As Pierce began to read the letter, Slonaker and Caputa appeared (the door was slightly ajar).

[5]Local Supplement No. 7 between the Local Union and Respondent defines division steward: "A division steward is the official representative of the employes [sic] of the Pittsburgh Mfg. & Repair Plant (Glassport)."

[6]Readal had conferred with Venters concerning the disciplinary action to be taken against Smarra.

Slonaker asked Readal "what was going on." Readal said he was giving "this girl 3 days off disciplinary action." Smarra handed the letter to Slonaker who, after having read the letter, asked Readal what he meant by the second paragraph. Readal replied, "I don't think it's none of your business." Readal further declared that Smarra was represented by a section steward and that Slonaker and Caputa should leave ("get the hell out of here").[7] Smarra, at no time, had addressed a specific request to Readal for Slonaker's presence although she did pass the letter to Slonaker which she had received from Readal when Slonaker entered the office.

Slonaker testified that "it had been the past practice at the Glassport Plant, any time there is a disciplinary action, that the division steward more or less will take an interest in and seeing what he can do to resolve the problem." Slonaker had previously been invited into a disciplinary meeting with Readal in which Readal was considering suspending an employee for a day. A steward was present. Readal agreed that Slonaker had been present at other disciplinary meetings, along with union stewards. Former division stewards testified credibly that they had participated in disciplinary meetings comparable to the one from which Slonaker was excluded and that it had been past practice for them to attend.[8]

Moreover, the agreement between Respondent and the Local Union provides that a grievance involving a suspension shall start at the third step of the grievance procedure in which step the division steward is clearly a participant. Indeed, prior

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[7]Venters testified that he had received information that "Readal had felt that Mr. Slonaker had no business really being there then."

[8]In respect to these meetings, Respondent concedes in its brief (p. 7):

> On some occasions, the division steward or the sub-division steward has attended. On others he has not.
>
> On many occasions, for one reason or another, the Company has invited or requested that the division steward or the sub-division steward attend employee discipline sessions.
>
> The evidence reveals several occasions when a division steward, section stewards, and other employees were present at meetings with Company representatives.

to November 3, 1977, neither Slonaker nor the Local Union had received any notification from Respondent that the practice which Slonaker sought to follow had been changed or that the division steward could no longer attend disciplinary meetings. Prior to November 3, 1977, there had been no incident where a division steward had been refused permission to attend and disciplinary meeting or had been expelled from such a meeting. Additionally no business reason existed for Slonaker's expulsion. Neither Slonaker nor Caputa was on company time.

Respondent presented no credible evidence that past practice as well as the contract did not permit the division steward to attend a disciplinary occurrence such as the one to which Smarra was subjected. Hence, the General Counsel, as alleged in the complaint, has established that, unilaterally and without prior notice to or consultation with the Local Union, Respondent refused to permit Division Steward Slonaker to be present while an employee was being administered disciplinary action despite a past practice of permitting the division steward to be present on such occasions. Such conduct on the part of the employer was a unilateral change in the employer's policy and working conditions and constituted a violation of Section 8(a)(5) and (1) of the Act. *Tufts Brothers Incorporated*, 235 NLRB No. 100 (1978).[9] See also *Alfred M. Lewis, Inc.*, 229 NLRB 757, 758 (1977).

Second: Under section XIV—Settlement of Disputes, the contract between the International Union and Respondent provides: "Before leaving work to conduct union business, the Local officer or steward will report to his foreman or supervisor and request permission to leave his job, which *will* be

[9]While it is my opinion that this incident involved an independent violation of Sec. 8(a)(1), I have made no such finding since the General Counsel has not requested it. The figurative slap in the face ("get the hell out of here") delivered by Readal was calculated to bring the Local Union in ill repute, weaken its effectiveness, undermine its representation of employees, promote discord and strife, and discourage employees from acting as union agents and from continuing their union affection in violation of the rights guaranteed by Sec. 7 of the Act.

granted unless his departure would cause *serious interference with operations.* In such cases the foreman or supervisor will make arrangements for the Local officer or steward to leave his job as promptly as possible." [Emphasis supplied.]

Respondent claimed that prior to the commencement of work on the morning of November 4, 1977, it had received a request from U.S. Steel Clairton Mill to put three 908 motor frames being repaired by Respondent "in an emergency breakdown basis because they had burned up the last spare and they needed those motors back as quickly as possible."[10] However, Respondent's records for the three jobs, F—106, F—110, and F—103, reveal that job F—103 was changed to emergency breakdown basis on October 30, 1977, and that job F—110 was never put on emergency breakdown status. In respect to job F—110, the records indicate that it was marked "EB" (emergency breakdown status) on October 31 and November 1 and 2, 1977. Respondent's records further indicate that Slonaker worked 3 hours on job F—110 on November 3, 1977. On the same date he was allowed time for union business at the end of the day. Neither Slonaker nor Kozar and Keches, the other two welders, worked overtime on November 2 or 3.

Venters testified that it would have taken about 20 hours of welding "to get them out of trouble where they would have enough to keep running."[11] At the time, the Glassport plant employed three welders—two on the first shift and one on the night shift. Slonaker and George Keches were assigned to the first shift.[12]

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[10]Readal explained that "[e]mergency breakdown means the customer is in dire need of that motor job... and he is willing to withstand whatever expense is needed in order to get that back."

[11]Job F—103 was completed on November 15, 1977; F—110, on December 5, 1977; and F—106 on April 4, 1978. Respondent's records indicate that Respondent worked its employees only a few hours a day on these jobs.

[12]The 20 hours of work anticipated would have required the full time of Slonaker and Keches on the first shift and 4 hours of the welders' time on the second shift. Thus, normally, the welding job would have been completed at 8 p.m. on November 4, 1978.

On November 4, 1977, Slonaker and Keches were assigned by Readal to weld on the frames; however, Slonaker asked for time off[13] to write the Smarra grievance. According to Readal he replied, "I can't let you have union business this morning. I want you to work on one of 908 motor frames for Clairton Mill and George will work on the other one. I said as far as filing a grievance, the section steward should be able to handle that." Slonaker asked that a replacement be obtained for him as soon as possible. Readal replied, "you've got to stay on your job... I'll replace you when I see fit." Slonaker then asked to make a phone call. Readal responded, "I'll tell you when you can take union business and I'll also tell you when you can use the telephone." Nevertheless, after Readal left the weld shop, Slonaker used the phone and called the Local Union. He was advised by the union business agent "to write the grievance as quick as possible and to get back to [his] work station." The phone call occurred around 8 o'clock.

In the meantime, Readal met Plant Manager Venters and informed him of the situation. Venters instructed Readal to make sure Kurta and Pierce be given permission to be excused for union business.

After receiving the advice from the union business agent, Slonaker went to the lunchroom where, together with Pierce and Kurta, he commenced to write up the Smarra grievance. About 8:15 p.m., Readal noticed Slonaker in the lunchroom. He entered and asked Slonaker whether he was returning to his job. Slonaker replied that he would go back to his job as soon as he wrote up the grievance. After informing Venters of the situation, Readal returned to the lunchroom and again asked Slonaker if he was going to return to the job. Slonaker replied that he would return as soon as he finished writing the Smarra grievance. Whereupon Readal asked Slonaker if he was refusing to return to the job. He answered, according to Kurta, whom I credit, "I just got done telling you, I have union time, I

[13]Under the contract Respondent would not have been charged for the time Slonaker spent writing the grievance. The time was chargeable to the Local Union.

called the local, and they told me to take union time, to write this grievance up, and as soon as I am done, I'm going back to work." At this time, Readal also mentioned that the job was an emergency job and the frames were needed.

After again conferring with Venters, Readal escorted Slonaker to Venters' office where Slonaker was told that if he did not return to his job, he would be suspended indefinitely. Slonaker returned to his job. Neither Readal nor Venters suggested any alternatives which would have afforded Slonaker an opportunity to have participated in the grievance writing.

The grievance writing was finished at or around 10 a.m. According to Kurta, it took about an hour, actually, to write the grievance. Slonaker laid the written grievance on Venters' desk at noon.

The foregoing resume, as well as the record as a whole, indicates that Readal had no intention of complying with that part of the contract which required him under the circumstances here to "make arrangements" for Slonaker "to leave his job as promptly as possible." In fact, he rebuffed Slonaker's request for a replacement. Nor did he suggest any alternatives whereby Slonaker could have remained on the job until the emergency was accomodated and yet have had an opportunity to participate in the writing of the grievance. Readal's approach to Slonaker's request was, in essence, a continuation of his disposition to place Slonaker in a position where his effectiveness as a union steward would be depreciated and the representative status of the Local Union undermined and downgraded. His desire to flaunt his prerogatives for these purposes outweighed his spurious concern for the emergency at hand, which was no emergency at all in terms of welding requirements. Indeed, had he released Slonaker he would have lost perhaps an hour in welding production. This would have meant, in order to have met the apparent target of 8 p.m., either Slonaker or Keches would have worked an hour overtime (which was chargeable against the customer) or the second-

shift welder could have finished the job at 9 p.m. instead of 8 p.m. Obviously, this is not the kind of a situation contemplated under the contract which would "cause serious interference with operations," nor has Respondent shown otherwise with credible proof.[14] It follows, therefore, that Readal's action violated the contract and the General Counsel's claim must be deemed well taken. Respondent's misconduct resulted in an unlawful midterm modification of the contract, and a repudiation of the Union as statutory bargaining representative in violation of Section 8(a)(5) and (1) of the Act. See *Nedco Construction Corp.*, 206 NLRB 150 (1973), *Oak Cliff-Golman Baking Company*, 207 NLRB 1063, 1064 (1973); *Fairfield Nursing Home*, 228 NLRB 1208 (1977). Cf. *Columbus Foundries, Inc.*, 229 NLRB 34 (1977).

Third: On November 13, 1977, Thomas K. Phares, director of corporate communications,[15] in respect to an inquiry from the Pittsburgh Press, informed the paper as published in the November 13, 1977, edition of the Pittsburgh Press: "Our position is that elected union officers have a responsibility under the contract to assume leadership roles and take aggressive steps to prevent illegal work stoppages.[16] When the stewards twice refused to do so, they were give 3-day disciplinary furloughs, a practice which has precedence in previous arbitration and court cases." (G.C. Exh. 7.) This position statement was in reference to a work stoppage or strike which occurred at the Glassport plant on November 4, 1977, immediately after the lunch break at 12 noon.

[14]Respondent showed no sense of urgency until Slonaker requested time off to write the Smarra grievance.

[15]Phares described his job as follows: "My responsibility is basically to establish policies for the corporations public relations and other communications activity and to handle day-to-day contacts with the media in various parts of the world."

[16]The contract between the International and Respondent provides: "[T]he Union and the locals will not cause or officially sanction their members to cause or take part in any strike (including setdowns, stay-ins, show-downs, or any other stoppage of work) during the life of this agreement."

During the morning of November 4, 1977, rumors circulated throughout the plant regarding Smarra's suspension, Slonaker's expulsion from Readal's office, and Readal's denial of union time for Slonaker to write the Smarra grievance.

In response to these rumors, the employees gathered on the parking lot during the lunch break for an explanation of what had occurred. Slonaker and other employees had encouraged such a meeting, which he attended together with Pierce and Kurta. Slonaker, amid many vocal interferences, described the events covering the Smarra incident, his exclusion from Readal's office, and his denial of union time to write the Smarra grievance. After he had completed his explanation the employees were of a disposition not to return to work. Nevertheless, he announced that the stewards were returning to the plant and he, Pierce, and Kurta returned to the plant. The assembled employees[17] vociferously protested with expletives.[18]

Upon their return, the stewards met Alan Anderson, who inquired as to what was occurring. He was informed that the stewards did not think that the employees were coming back in the plant. Kurta told him that the stewards "would like to get a meeting with management to resolve this problem, and get the people back in the building." Anderson left and returned stating: "Lou Venters would not hold no meeting until the people come back to work."

In the meantime, Venters had been informed by his supervisors concerning the situation among the first-shift employees. He instructed them to "go out and inform the union stewards that they have a responsibility to get the people back to work."[19] Supervisors Gibson, Readal, and Robert C. Rugh,

[17]There were about 40 employees on the first shift.

[18]Readal's conduct was prone to excite, inflame, and anger employees (a fact which must have been known to him if he were a knowledgeable supervisor), for in essence he was ejecting the division steward from the grievance system. A self-respecting union would no more permit this conduct than would an employer whose representative the union sought to oust.

[19]Gibson's testimony.

following Venters' instructions, informed the three stewards (Slonaker, Pierce and Kurta) that they were involved in an illegal work stoppage and that they had "a responsibility to get the people back to work." The supervisors returned to Venters' office with their report after which Venters instructed the supervisors to return and tell the stewards, "if they don't go back to work the stewards don't go back to work, tell them to vacate the building."[20] Rugh and Gibson returned to the plant. Gibson asked Slonaker whether he had done "any good getting the people back to work." Slonaker replied that he "tried" but, he "was unable to do so." Gibson continued, "if you don't intend to go back to work, vacate the building." The stewards left the plant.[21]

Gibson reported to Venters that he had "told Howard Slonaker to try to get the people back again, that he had asked the three stewards to go back to work, they had refused and then he had asked them to leave the plant per Mr. Venters' instructions previously."[22] Venters was also informed that Slonaker told Gibson that he had "tried to get the employees back to work," but they wouldn't come in. Rugh reported to Venters that he did not know who the instigators of the strike were; Gibson reported that he thought the instigators were Slonaker, Hutzler, and Murelli.[23] Venters received no information as to what had occurred in the parking lot, either from his supervisors or from the rank-and-file.

Such was Venters' information when he considered what was to be done. He resolved to give all first-shift employees a day's suspension, and the three stewards a 3-day suspension.[24]

[20]Gibson's testimony.

[21]Gibson also said:

"[I]f you can't handle your men, that I think you need another steward structure in the building, in Glassport here..."

[22]Rugh's testimony.

[23]Hutzler and Murelli were not stewards. Significantly, they were not given a 3-day furlough.

[24]This was the first Glassport strike in which stewards had been given more days off than the rank-and-file employees. Strikes for which employees had been given a 1-day layoff had occurred on August 9, 1977, and September 8, 1977.

He phoned his "industrial relations person," Henry Bunting, "to see if he concurred with the penalty [he] had decided upon." Bunting agreed.[25] The conversation occurred shortly after 12 o'clock. Immediately thereafter, Venters commenced sending mailgrams to "[a]ll employees who were actively employed on the day light shift." Venters' decision for the second shift was "Wait and see".

At the same time, five of the Glassport employees were on "a road job," at Shelocta, Pennsylvania, around 50 miles from Glassport. Steward Shaver was among the employees. On the afternoon of November 4, 1977, around 2:30 p.m., John Biggins, the employees' supervisor, informed Shaver of the walkout at Glassport. The employees met in Biggins' presence and decided to stay on the job and finish the shift. Therefter, when Shaver returned to his home after work, Biggins informed him by phone that he had "the following Monday off for participating in an illegal work stoppage, and that he should return on Tuesday morning." On Monday, Shaver was informed by phone that he was given a 3-day suspension.[26]

According to Venters, at or about 2 p.m., he decided to impose the same penalty on the "on the road" employees although they had engaged in no strike. In this regard, Venters testified that Biggins reported to him that the "on the road employees" had "decided that they would finish the shift, that there was no possible way they could work Monday if the other people were on strike, so they weren't working either."[27] Venters heard nothing specifically concerning Shaver's position or attitude. Shaver was singled out, nevertheless, according to

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[25]According to Venters, he told Bunting that the stewards should be given 3 days off because "they instigated and condoned the strike."

[26]A mailgram dispatched to Shaver at 8:59 a.m., November 7, 1977, read: "In view of this act that you participated in an illegal work stoppage at Westinghouse Glassport Plant at 12 noon on 11/4/77 this is to advise you of the imposition of a disciplinary furlough of the rest of your normal shifts of 11/7, 11/8, and 11/9. You will be expected to report for work on 11/10/77 at your regularly scheduled time."

[27]It would seem that Venters' response by way of leveling a penalty in this instance was premature, anticipatory, and without substantial support.

Venters because "his actions didn't indicate that he would report to work or that he wanted his people to report back to work on Monday morning."

Hugh Joseph Piccini had been a steward on the third shift, which had been discontinued prior to November 4, 1977. He claimed that his job as steward ceased along with the shift, but the record is unclear as to whether Respondent was informed that such may have been the case. Nevertheless, he was given a 3-day suspension, as were the other stewards.[28]

On November 4, 1977, at or about 2 o'clock, Piccini, who had visited a doctor, passed the plant and noticed no parked automobiles. He stopped and inquired of Readal as to what happened. Readal replied that the men had walked out and he didn't now why. According to a report to Venters, Piccini was quoted as saying, "those crazy bastards" and left. Piccini returned to the plant for the second shift, to which he was assigned. None of the second shift, including Piccini, went to work.[29] Piccini was given 3 days' penalty because, according to "I felt that he was condoning and going along with the strike." Piccini asked Readal why he was given a 3-day suspension. Readal replied that, "all the stewards got them." Piccini further advised Readal that he was not a steward. Readal said that he would take it up with Venters. Later, Supervisor Cal Verzinski reported to Piccini that he had told Venters that Piccini was not a steward, but, "he just wouldn't listen."

On November 4, 1977, prior to the time he had learned of the strike, Steward Nicola Caputa informed Respondent that he had contracted the flu. On November 3, 1977, he had made arrangements with his supervisor to remain at home on November 4, 1977, and since he was becoming ill, to allot the

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[28]Respondent first sent Piccini a telegram at 4:22 p.m. on November 4, 1977, which informed him that he was disciplined for Monday, November 7, 1977. This was superceded by a second mailgram, sent 5 minutes later, telling Piccini he was suspended for 3 days.

[29]There were around 24 employees on second shift. A majority appeared for work.

time off as a vacation day. In this regard, Venters knew that Caputa had called in sick around 1 o'clock and knew that Caputa had scheduled November 4, 1977, as a vacation day. Nevertheless, Venters said that he considered Caputa's phone call as "further condoning, instigating and carrying on the strike."[30] When the second shift failed to report on November 4, 1977, Venters caused mailgrams to be sent to them imposing the same penalty given to the first shift.

Rugh testified that the stewards were disciplined because they "had failed to try and keep the people from walking out or did not try to bring them back in." Venters said that he differed from the Phares' newspaper position because he "felt the stewards instigated and condoned the strike" although he did say that he had "partly" in mind the motivating factors appearing in the Pittsburgh Press article mentioned above; i.e., that the stewards did not "assume leadership roles and take aggressive steps to prevent illegal work stoppages."

The General Counsel maintains that the reason for Respondent selecting six alleged discriminatees for additional disciplinary penalty was because each held the position of shop steward, Piccini excepted. This assertion is well taken. Obviously, Venters did not move against the instigators as such. His information on this subject gained from Gibson named Slonaker, Hutzler, and Murelli as instigators. Moreover, as to Slonaker, he had received information that he had tried to induce the employees' return to work but was unsuccessful. Only Slonaker was given the extra time. Thus, it is clear that Slonaker was not discharged because he was an instigator or a condoner, since, according to Venters' information, he had tried to abort the strike. Moreover, other alleged instigators who where not stewards were not given the extra penalty. Slonaker was penalized because he held the position as steward. Indeed, the claim of condonation of the strike as a basis for its disciplinary action against the stewards is illusory, for Shaver was disciplined before it could have been ascer-

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[30]Caputa lived in Verona, Pennsylvania, about 17 miles from Glassport.

tained that he would support the strike and, although Caputa had received vacation time for illness before the strike occurred, he was penalized, although neither by act nor deed did he, as a sick man, do anything that could be judged condonation. This, it is obvious that the alleged discriminatees were singled out as stewards for which sole reason they were given additional days off. By reason of their selection as stewards, as a matter of law, they do not have imposed upon them the affirmative duty to assume leadership roles and take aggressive steps to prevent a work stoppage even assuming, *arguendo*, that the work stoppage is illegal.[31] See *Precision Casting Company, etc.*, 233 NLRB No. 35 (1978). Based upon this case, the finding must be for the General Counsel.[32] Accordingly, Respondent is guilty of violating Section 8(a)(3) of the Act.[33]

Conclusions of Law

1. The Union is a labor organization within the meaning of the Act.

2. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act for jurisdiction to be exercised herein.

3. By suspending for 2 days more than rank-and-file employees Ronald Shaver, Hugh Joseph Piccini, Nicola Caputa, Charles Kurta, Howard Slonaker, and Clyde Pierce for allegedly participating in the November 4, 1977, walkout, on the sole basis that each held the position of union steward, or was believed to have held such position, Respondent violated Section 8(a)(3) and (1) of the Act.

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[31]Since the General Counsel has not put in issue whether the stike was legal or illegal, I have made no finding in that regard. However, it is clear that the strike, a spontaneous response to Respondent's unfair labor practices, was caused by Respondent's unfair labor practices and therefore may not be deemed an illegal strike. Cf. *Medo Photo Supply Corporation v. N.L.R.B.*, 321 U.S. 678 (1944).

[32]In *Precision Casting Company, supra*, the Board opined, "However, discrimination directed against an employee on the basis of his or her holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act." The instant case may not be distinguished from *Precision Casting Company, supra*.

4. By unilaterally refusing to permit Division Steward Slonaker on November 3, 1977, to be present while an employee was receiving notice of a disciplinary action, in contradiction of a past practice permitting the division steward to be present on such occasions, and by denying Division Steward Slonaker on November 4, 1977, time off to leave his job for the purpose of conducting union business as prescribed by the collective-bargaining agreement between Respondent and the International and Local Union, Respondent violated Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since it has been found that Respondent violated Section 8(a)(3) of the Act by suspending Stewards Ronald Shaver, Hugh Joseph Piccini,[34] Nicola Caputa, Charles Kurta, Howard Slonaker, and Clyde Pierce, each for a period of 2 days more than the rank-and-file employees, it is recommended that Respondent be ordered to cease and desist therefrom, and to make the employees whole for any loss of earnings they may have suffered as the result of the additional suspensions, with interest thereon to be computed in the manner set forth in *Florida Steel Corporation,* 231 NLRB No. 117 (1977).[35]

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[33]Respondent's claim that this matter be deferred to arbitration is denied. *General American Transportation Corp.,* 228 NLRB 808 (1977).

[34]Because the remedy would have been the same, I have deemed it unnecessary to determine whether Piccini was an acting steward on November 4, 1977.

[35]See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

Accordingly, upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[36]

The Respondent, Westinghouse Electric Corporation, Glassport, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully excluding the division steward from being present when an employee is given a notice of a disciplinary action at Respondent's Glassport plant.

(b) Unlawfully denying the division steward or any steward time off to leave his job for the purpose of conducting union business as prescribed by the collective-bargaining agreement between Respondent and the International and Local Union.

(c) Unlawfully suspending shop stewards who engage in strikes or any other concerted activity for a greater length of time than rank-and-file employees or for any length of time solely because they hold positions as stewards.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole employees Ronald Shaver, Hugh Joseph Piccini, Nicola Caputa, Charles Kurta, Howard Slonaker, and

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[36]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Clyde Pierce for any loss of earnings they may have suffered as the result of Respondent's unlawfully suspending them in the manner set forth in the section of this Decision entitled "The Remedy" and rescind their unlawful suspensions.

(b) Preserve and, upon request, make available to the Board or its agents, for examinations and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its plant in Glassport, Pennsylvania, copies of the attached notice marked "Appendix."[37] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D.C. September 20, 1978.

...../s/. LOWELL GOERLICH .....
Lowell Goerlich
Administrative Law Judge

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[37]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board has found that we have violated the law and has ordered us to post this notice.

WE WILL NOT unlawfully exclude the division steward, presently Howard Slonaker, from being present when an employee is given a notice of a disciplinary action at our Glassport plant.

WE WILL NOT unlawfully deny the division steward, presently Howard Slonaker, or any steward, time off to leave his job for the purpose of conducting union business as prescribed by our collective-bargaining agreement with the Union at our Glassport plant.

WE WILL NOT unlawfully suspend shop stewards who engage in strikes or other concerted activity for a greater length of time than rank-and-file employees or for any length of time solely because they hold positions as shop stewards.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL make whole Ronald Shaver, Hugh Joseph Piccini, Nicola Caputa, Charles Kurta, Howard Slonaker, and Clyde Pierce for any losses they may have suffered as a result of our unlawfully suspending them on November 4, 1977, plus interest, and rescind their unlawful suspensions.

WESTINGHOUSE ELECTRIC CORPORATION
(Employer)

Date ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Porter Building—10th Floor, 601 Grant Street, Pittsburgh, Pennsylvania 15219, Telephone 412-644-2969.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-1707 **September Term 1980**

International Union of Electrical
Radio & Machine Workers,
AFL-CIO-CLC,
Petitioner

v.

National Labor Relations Board,
Respondent

Westinghouse Electric Corporation,
Intervenor

United States Court of Appeals
for the District of Columbia Circuit
FILED JAN. 14, 1981
GEORGE A. FISHER
CLERK

and consolidated case no. 79-1862

BEFORE: Wright and MacKinnon, Circuit Judges, Gasch*; Judge, United States District Court for the District of Columbia

ORDER

On consideration of the petition for rehearing of the Westinghouse Electric Corporation, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

UNITED STATES COURT OF APPEALS
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No. 79-1707 **September Term 1980**

International Union of Electrical
Radio & Machine Workers,
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Petitioner
v.
National Labor Relations Board,
Respondent

Westinghouse Electric Corporation,
Intervenor

United States Court of Appeals
for the District of Columbia Circuit
FILED JAN. 14, 1981
GEORGE A. FISHER
CLERK

and consolidated case no. 79-1862

BEFORE: McGowan; Chief Judge, Wright, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg; Circuit Judges, Gasch*; Judge, United States District Court for the District of Columbia

ORDER

The suggestion for rehearing *en banc* of the Westinghouse Electric Corporation has been transmitted to the full court. A majority of the court has not voted in favor of rehearing this matter *en banc* and, it is therefore

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, Clerk
BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

Circuit Judges Tamm, MacKinnon and Robb would rehear this matter *en banc*.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 79-1707 **September Term 1981**

International Union of Electrical,
Radio & Machine Workers,
AFL-CIO-CLC,
Petitioner

v.

National Labor Relations Board,
Respondent

Westinghouse Electric Corporation,
Intervenor

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR. 6, 1981
GEORGE A. FISHER
CLERK

and Consolidated Case No. 79-1862

BEFORE: Wright and MacKinnon, Circuit Judges; and Gasch*, Judge, United States District Court for the District of Columbia

ORDER

Upon consideration of petitioner's motion for stay of mandate pending application for a writ of certiorari, and non opposition having been filed thereto, it is

ORDERED, by the Court, that petitioner's aforesaid motion is granted and the Clerk is directed not to issue the mandate herein prior to April 1, 1981.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §292(a).

LISTING OF ALL PARENT COMPANIES, SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES) AND AFFILIATES OF WESTINGHOUSE ELECTRIC CORPORATION

Subsidiaries:

Ateliers de Constructions Electriques de Charleroi, S.A. (ACEC)
Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)
Electromar Industria Electrica Brasileira, S.A.
Electromar Nordeste, S.A.
Galileo Argentina C.I.F.S.A.
Hundt & Weber Schaltgerate GmbH
Living & Learning (Cambridge), Ltd.
Mecanica Pesada, S.A.
Mex Control S.A. de C.V.
Motores Electricos de Juarez S.A. de C.V.
Offshore Power Systems
Schneider S.A.
Silectra S.A. de C.V.
Societa Progettiazione Reattori Nucleari, S.p.A. (SOPREN)
Tyree Industries Limited
W. T. Engineering Pty. Limited
Westralian Transformers Pty. Limited
Tyree-Power Construction Limited
CATV Enterprises, Inc.
Home Theater Network, Inc.
Westinghouse Canada Inc.
Transformadores de Distribucion, S.A. (TRADESA)
Westinghouse Electro Metalurgicas C.A. (WEMCA)
CMW Sistemas, Ltda.
Industry Services Company of Saudi Arabia, Ltd. (ISCOSA)
Galileo Argentina, C.I.F.S.A.
Thermo-King do Brasil Ltda.
Westinghouse, S.A. (WESA)

LISTING OF ALL PARENT COMPANIES, SUBSIDIARIES (EXCEPT WHOLLY OWNED SUBSIDIARIES) AND AFFILIATES OF WESTINGHOUSE ELECTRIC CORPORATION
Continued

Westinghouse Proyectos Electricos, S.A. (WEPESA)
Westinghouse Asia Controls Corp.
Westinghouse Supply Company of Saudi Arabia (WESCOSA)
IEM S.A.
Mex Control, S.A. de C.V.
Silectra, S.A. de C.V.
Wexico Systems and Services, Ltd.
China Industry Services Co., Ltd.
Offshore Power Systems
Westinghouse (Jamaica) Ltd.
Westinghouse Proyectos Electricos, S.A. (WEPESA)
Ateliers de Constructions Electriques de Charlerio S.A. (ACEC)
Galileo Argentina, C.I.F.S.A.
IEM S.A.
Electrocontroles Villares, Ltda.

No. 80-1635

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC IN OPPOSITION TO PETITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the finding of the National Labor Relations Board that Petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by imposing disparate disciplinary treatment upon three employees solely because of their positions as union stewards was supported by substantial record evidence.

PARTIES TO THIS PROCEEDING

The only parties to the proceedings below were the Petitioner, and Respondents, National Labor Relations Board and International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC.

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OPINIONS BELOW

Petitioner's Appendix (2a) through 36(a) sets forth the decisions of the United States Court of Appeals for the District of Columbia Circuit and the National Labor Relations Board which are the subjects of this proceeding.

JURISDICTION

The jurisdictional requisites of this Court have been adequately set out in the Petition.

STATUES INVOLVED

In addition to Section 8(a) (3) of the National Labor Relations Act (hereinafter referred to as the NLRA or the Act), 29 U.S.C. §158(a)(3), which is reproduced in Petitioner's Brief at page 7), the case also involves Sections 7 and 8 (a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §157 and §158(a)(1) and (5):

> Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
>
> Section 8(a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159 (a) of this title.

COUNTERSTATEMENT OF THE CASE

(1) Introduction

Petitioner has asked this Court to grant certiorari to review limited aspects of a *per curiam* unpublished decision of the Court of Appeals for the District of Columbia Circuit in the consolidated case of *Westinghouse Electric Corporation* v. *National Labor Relations Board and International Union of Electrical, Radio and Machine Workers, AFL-CIO,* Nos. 79-1862 and 79-1707 (December 5, 1980) which granted enforcement of a Decision and Order of the National Labor Relations Board in *Westinghouse Electric Corporation and International Union of Electrical, Radio and Machine Workers*, 243 NLRB No. 44 (July 3, 1979)[1]. In this latter decision, the Board found that Westinghouse Electric Corp. violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5) by: (1) excluding a Union division steward at its Glassport, Pennsylvania plant from a meeting in which an employee was being given a disciplinary suspension, in contravention of well-established practice and the collective bargaining Agreement; (2) refusing to permit the same

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[1] Both Westinghouse and the IUE filed petitions for review. Westinghouse unsuccessfully sought to have all of the Board's Section 8(a)(1), (3) and (5) findings reversed. The Union sought to have the Circuit Court remand the case to the Board for a finding that the work stoppage was an unfair labor practice strike under the principles enunciated by this Court in *Medo Photo Supply Corp.* v. *NLRB,* 321 U.S. 678 (1944) and *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956). Although the Administrative Law Judge and Board Member Jenkins (in a partial dissent) found that the stoppage was provoked by Westinghouse's deliberate and unjustifiable assault on the grievance procedures and the Union's representatives, the Board declined to rule on the nature of the stoppage, and the Circuit Court enforced the Board's order in its entirety.

division steward from taking contractually guaranteed time off to prepare and file the grievance over the employee's disciplinary suspension; and, Section 8(a)(1) and (3) of the Act by discriminatorily imposing more severe disciplinary suspensions against all six IUE Local 601 stewards at the Glassport plant merely because of their positions in the Union and which was more severe than the one-day discipline of rank and file employees. (Petitioner's Appendix 9(a)-12(a)).

Petitioner only seeks review of the more severe disciplinary suspensions imposed by Westinghouse against three of these six stewards, Howard Slonaker, Charles Kurta and Clyde Pierce.

To gain this Court's attention, Petitioner has ignored the findings made by the Board, distorted the facts presented in this case, and erroneously stated the legal basis for the Board's conclusion that Westinghouse violated Section 8(a)(1) and (3) of the National Labor Relations Act by punishing all Union representatives more severely than rank and file employees who participated in a brief, spontaneous work stoppage. The Court of Appeals for the District of Columbia Circuit enforced a unanimous Board decision which held that:

> ". . . the Administrative Law Judge correctly found that the disciminatees [sic] received harsher penalties *solely because they held the position of steward.* (One discriminatee stated that at the time of the work stoppage he was no longer a steward, but he received the harsher punishment because Respondent believed he was a steward.) In light of its having meted out severer discipline to stewards who were not even present at the plant during the work stoppage, Respondent cannot legitimately contend that its disciplining of stewards was based on any alleged failure by the stewards to urge other

employees to return to work. Accordingly, *it is clear that Respondent violated Sec. 8(a)(3) by imposing harsher discipline on six employees solely because they held, or were believe [sic] to have held the position of union steward.* See also *Pontiac Motors Division, General Motors Corporation,* 132 NLRB 413 (1961).

Members Penello and Truesdale, who dissented in *Gould Corp.* and indicated therein their disagreement with the Board's decision in *Precision Castings,* would adopt the Administrative Law Judge's finding that the more severe penalties imposed by Respondent on the six union stewards violated Sec. 8(a)(3) of the Act only because it is clear that: (1) Steward Slonaker, Pierce, and Kurta made a good-faith effort to get the striking employees to return to work and did not voluntarily participate in the strike; (2) Steward Shaver was working on a "road job" rather than at the plant on the day of the strike and, upon being informed of the strike, he continued working; (3) Steward Caputo was legitimately absent from work on the day of the strike and never participated in, nor lent his support to, the strike; and (4) Steward Piccini had ceased to be a steward prior to the day of the strike, and the sole reason that he was more severely disciplined was because Respondent thought he was still a steward." (Emphasis supplied)

Westinghouse Electric Corp., 243 NLRB No. 44 (1979) (Petitioner's Appendix 10a). Contrary to Petitioner's assertion that the decision of the Court of Appeals for the District of Columbia Circuit conflicts with those of other circuit courts,[2] the Board's decision below rested upon the unique and limited facts of this record, which

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[2] *Gould, Inc.* v. *NLRB,* 612 F.2d 728 (3rd Cir. 1979); *cert. den'd* _____ US _____, 101 S.Ct. 247 (1980); *Indiana & Michigan Electric Co.* v. *NLRB,* 599 F.2d 227 (7th Cir. 1979); and *NLRB* v. *Armour-Dial Inc.,* 638 F.2d 51 (8th Cir. 1981).

are sharply different from those cases which have been relied upon by Westinghouse.

(2) The IUE-Westinghouse Collective Bargaining Agreements At The Glassport, Pennsylvania Plant And The Company's Interference With The Grievance Procedure

The Westinghouse Glassport Apparatus Repair Plant, located in a suburb of Pittsburgh, Pennsylvania, is one of the more than forty facilities which has historically been represented by the International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, in a single, nationwide, multi-plant bargaining unit.[3] The approximately 80 production and maintenance workers of the Glassport Plant are employed on two shifts,[4] and were represented by Howard Slonaker, division steward (1st shift), Nicolas Caputo, subdivision steward (2nd shift), Charles Kurta and Clyde Pierce, section stewards (1st shift), and Ron Shavers, section steward (2nd shift). (Pet. App. 15a-16a) As a division steward of IUE's constituent Local 601, representing the employees of the Glassport Plant and more than 5,500 Westinghouse workers in the Pittsburgh area, Slonaker was the highest Union representative at the Glassport Repair Plant. (Pet. App. 16a) IUE and its Local 601 had executed consecutive National Agreements and Local Supplements covering these employees for more than thirty years,[5] which included a limited no-strike clause

[3] *See, Westinghouse Electric Corporation and IUE,* 238 NLRB No. 102 (1978), supplemented by 240 NLRB No. 106 (1979); *enf'd* Docket Nos. 78-1691 and 79-1246 (4th Cir. 1980); *cert. den'd* Docket No. 80-224 (1980).

[4] The third shift and employee Hugh Picinni's role as steward on that shift, were ended prior to the events here. (Pet. App. 15a and 26a).

[5] Pet. App. 16a-17a; and 22a, introduced as General Counsel's Exhibits #16 and 17 at the trial below.

providing, in Section V, (A) of the National Agreement:

> "The Union and the locals will not cause or officially sanction their members to cause or take part in any strike (including setdowns, stay-ins, showdowns or any stoppage of work) during the life of this agreement)"

(Pet. App. 22a) However, the IUE and its Locals are permitted by the National Agreement and its Glassport Local Supplement to strike over a wide variety of issues and grievances once ". . .the grievance procedure has been fully exhausted."[6]

The IUE Local Supplement pertaining to Glassport employees provided that the division steward was the official representative of Local 601 and the workers of the Glassport Plant (Pet. App. 10a), and that grievances concerning disciplinary suspensions of employees were to be initiated at the Third Step of the grievance procedure, which involved the division steward. (Pet. App. 17a) As the Administrative Law Judge and the Board found, it had been the practice at the Glassport plant that the division steward attended meetings in which employees were faced with disciplinary suspensions. (Pet. App. 18a) The final contractual provision material to this case is Section XIV(A)(2) of the National Agreement, which permits Union representatives to process grievances during working hours, under the following condition:

> "Before leaving work to conduct union business, the Local officer or steward will report to his foreman or supervisor and request permission to leave his job, which will be granted unless his depar-

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[6] General Counsel's Exhibit #17, at p. 4, introduced in the trial proceeding below, referred to in Pet. App. 22a.

> ture would cause serious interference with operations. In such cases, the foreman or supervisor will make arrangements for the Local officer or steward to leave his job as promptly as possible."

(Pet. App. 18a-19a)

On November 3, 1977, Division Steward Slonaker approached Glassport Plant Manager Louis Venters and asked whether Westinghouse intended to discipline an employee with 36 years' service, Philomena Smarra, for defective workmanship. (Pet. App. 16a) Venters declined to respond, and rejected Slonaker's request for a meeting to discuss the Smarro problem by saying he didn't have time to meet to discuss it. When Slonaker asked Smarra's foreman, Charles Readal, if Smarra would be disciplined, Readal insisted he had not "made up his mind," and declined to discuss the matter further. (Pet. App. 16a) At the end of the shift that day, Readal instructed Smarra and her steward, Clyde Pierce, to report to his office and once there he gave Smarra a three-day disciplinary suspension for defective workmanship. (Pet. App. 16a) When Division Steward Slonaker and Subdivision Steward Caputo walked into Readal's office,[7] Readal told them to "get the hell out of here" as Company representatives contended Slonaker and Caputo "had no business being there." (Pet. App. 17a)

The Administrative Law Judge and the Board found that the expulsion of Slonaker from the disciplinary meeting with Smarra constituted a unilateral and unjustifiable change of past practice and the employer's policy, and a modification of the Local Supplement, all

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[7] On her way to the disciplinary meeting, Smarra asked to have Slonaker and Caputo appear to represent her. (Pet. App. 16a)

in violation of Section 8(a)(1) and (5) of the Act. As observed below:

> "The figurative slap in the face . . . delivered by Readal was calculated to bring the Local Union in ill repute, weaken its effectiveness, undermine its representation of employees, promote discord and strife, and discourage employees from acting as union agents. . . ."

(Pet. App. 18a)

The next morning, Slonaker arrived at work and asked Readal for time off on Union business to investigate and prepare a grievance for Philomena Smarra. (Pet. App. 20a) Readal denied Slonaker's request, suggested that the section steward could handle the grievance and told Slonaker "you've got to stay on your job . . . I'll replace you when I see fit . . . I'll tell you when you can take union business and I'll also tell you when you can use the telephone." (Pet. App. 20a)[8] When Slonaker persisted and went to the lunchroom to write Smarra's grievance, he was threatened with indefinite suspension if he continued to work on the Smarra case and did not immediately return to his job. (Pet. App. 21a) Neither Readal nor Venters suggested any alternatives which would have provided Slonaker with an opportunity to participate in the preparation of this grievance, and Westinghouse made no arrangements, as required by the contract, to permit Slonaker time off. The Board found that Westinghouse's belated rationalization for refusing Slonaker's request, work on an emergency job, was nothing more than a spurious pretext to undermine Slonaker's effectiveness as a steward (Pet. App. 21a), and that Westinghouse's action

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[8] Slonaker had asked to use the telephone to contact the Local 601 business agent.

not only resulted in a mid-term modification of the contract, but repudiated the Union as the statutory bargaining representative in violation of Section 8(a)(1) and (5) of the Act.

3. The Spontaneous Walk-Out Of Glassport Employees And Westinghouse's Discipline Of The Union Stewards

After word of the expulsion of these Union stewards from Smarra's disciplinary meeting, and of the Company's threats against Slonaker for attempting to participate in the grievance preparation, spread through the plant, employees gathered in the parking lot during the lunch break for an explanation of these events. Not surprisingly, the assembled employees reacted with furor after hearing Slonaker's version of these events and vociferously refused to return to work. (Pet. App. 23a)[9] When Slonaker announced that he, Pierce and Kurta were returning to work, the infuriated workers in the parking lot reacted with expletives and derision and refused to follow their stewards back to the plant.[10]

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[9] As the Administrative Law Judge commented,

> "Readal's conduct was prone to excite, inflame, and anger employees (a fact which must have been known to him if he were a knowledgeable supervisor), for in essence he was ejecting the division steward from the grievance system. A self-respecting union would no more permit this conduct than would an employer whose representative the union sought to oust." (Pet. App. 23a).

[10] Petitioner's claim that these three stewards "made no efforts to dissuade the employees from striking and neither the stewards nor any of the other first shift employees returned to work that day" (Petition, p. 9) is clearly not supported by the record. Both Board Members Pennello and Truesdale relied upon the findings that ". . . Slonaker, Pierce, and Kurta made a good-faith effort to get the striking employees to return to work." (Pet. App. 10a)

When Slonaker, Pierce and Kurta returned to the plant, they met several Company representatives told them they had unsuccessfully tried to get the employees back to work,[11] and asked for a meeting. After consulting with Venters, Gilson told Slonaker:

> "I think this place (needs) another steward structure . . . and if you can't handle your men . . . if you can't get the people back in, get the heck off the premises."

(Pet. App. 24a) Venters asked his supervisors to identify those who were the instigators of the strike, and Supervisor Gilson reported that he thought Hutzler, Morelli and Slonaker had inspired the strike. (Pet. App. 24a)[12] After Slonaker and his stewards' efforts to resolve the stoppage failed, the first shift employees went home and the second shift did not report for work. (Pet. App. 24a-25a) However, those Glassport employees on a "road job" some 50 miles away at Shelocta, Pennsylvania, including steward Ron Shaver, worked their entire scheduled shift, even after they were informed of the stoppage at the Glassport plant. (Pet. App. 25a)[13]

Almost immediately, Venters imposed a one-day disciplinary suspension against all Glassport employees,

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[11] Petitioner's statement that the three stewards' ". . . only purpose in returning was to confront management over the strike and to present the Smarra grievance . . ." (Petition at p. 9) is also unsupported by the record.

[12] No additional disciplinary action was taken against employees Hutzler and Morelli. (Pet. App. 24a)

[13] The second shift subdivision steward, Nicolas Caputo, had informed his supervisor the day previously that he had the flu, and Caputo spent November 4, 1988, at home in bed, 17 miles from the Glassport plant. (Pet. App. 26a-27a)

and a three-day disciplinary suspension against all five IUE Local 601 stewards, Howard Slonaker, Nicolas Caputo, Clyde Pierce, Charles Kurta, and Ron Shaver, as well as Hugh Picinni, thought to be a steward by Westinghouse management.[14] Westinghouse's reasons for imposing the additional two-day suspensions against all Glassport's Union representatives has varied over the past four years. At the time the suspensions were imposed, telegrams sent by Petitioner's Plant Manager merely accused the stewards of "participating" in the work stoppage. (Pet. App. 25a) In press statements released during the stoppage, Company officials took the position that the additional discipline was warranted because the stewards did not ". . . assume leadership roles and take aggressive steps to prevent illegal work stoppages." (Pet. App. 27a) After the Board's decision in *Precision Castings Company*, 233 NLRB 183 (November, 1977) made the validity of the latter position appear untenable, Company officials claimed that these five stewards and one former steward "instigated, led and fomented the strike." (Pet. App. 27a)

REASONS FOR DENYING THE WRIT

The crux of Petitioner's argument for this Court's review, is that the Board's unanimous decision was based upon the doctrine of *Precision Castings Company, supra,* and that the enforcement of the Board order in *Westinghouse,* therefore, directly conflicts with prior

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[14] Petitioner claims some dispute over whether Picinni was still a steward in November, 1977, but the record contains no evidence that he retained his position after the third shift was eliminated.

decisions of the Third Circuit in *Gould, Inc.* v. *NLRB,* 612 F.2d 728 (3rd Cir. 1978); of the Seventh Circuit in *Indiana & Michigan Electric Company* v. *NLRB,* 599 F.2d 227 (7th Cir. 1979); and *NLRB* v. *Armour-Dial Inc.,* 638 F.2d 51 (8th Cir. 1981).

While there can be no doubt that a majority of Board members have continued to uphold the vitality of *Precision Castings* despite adverse comment from these three courts of appeal,[15] there is equally no doubt that the Board's decision in the present case was determined by its unique facts and not by application of the *per se* rule of *Precision Castings.* As Board Members Truesdale and Penello, who sharply dissented in *Gould, Inc., supra,* and its progeny, firmly pointed out below, stewards who worked during the strike, those who were legitmately away from work on sick leave during the stoppage, those who had no role whatsoever to play in the stoppage, those who were thought to be stewards, and those who made good-faith efforts to end the strike, were all disciplined equally and for the same reason, *solely because they held union office.*

While in other circumstances we would insist that *Gould, Indiana & Michigan Electric,* and *Armour-Dial* have been wrongly decided, and would seek to have this Court sanction the Board's *Precision Castings* rationale, this is not the case for us to do so, or for this Court to review the important issue presented by *Precision*

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[15] *See, Rogate Industries, Inc.,* 246 NLRB No. 143 (1979); *Babcock & Wilcox Co.,* 249 NLRB No. 99 (1980); *C.H. Heist Co.,* 250 NLRB No. 185 (1980); *Bethlehem Steel Corp.,* 252 NLRB No. 138 (1980); *Miller Brewing Co.,* 254 NLRB No. 24 (1981); and *South Central Bell Telephone,* 254 NLRB No. 32 (1981).

Castings. For, unlike the circumstances of *Indiana & Michigan Electric Co.* v. *NLRB, supra,* at 228-229, where the court relied heavily upon the fact that the employer only disciplined stewards who actively joined the strikers, *all* IUE stewards were disciplined more harshly here. In that same case, the Seventh Circuit also noted that an employer may be permitted to ". . . take into account the union officials' greater responsibility . . ." 599 F.2d 232, yet Westinghouse disciplined stewards who did not participate in the strike as well as those who were found by the Board to have exercised some measure of additional responsibility and had taken steps (although they were unsuccessful) to end the stoppage.

Unlike the facts relied upon by the Eighth Circuit in *NLRB* v. *Armour-Dial, Inc., supra,* at 55, where the court found that all of the disciplined union representatives had, in fact, induced and fomented an illegal work stoppage, here the Board and District of Columbia Circuit found the opposite, that the three first shift stewards attempted to end the stoppage and were involuntary participants in it.[16]

Finally, unlike the contractual obligations imposed upon union representatives in *Gould, Inc.* v. *NLRB, supra,* at 733, which were deemed to be a proper basis for the imposition of harsher disciplinary measures against a steward who participated in a contract violative stoppage, the IUE-Westinghouse National Agreement contains no such explicit provision, and these IUE

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[16] Significantly, although these stewards returned to the plant on the afternoon of November 4th, Westinghouse's representatives instructed them to leave precisely because they were unable to convince their fellow employees to return to work.

stewards cannot be said to have failed to carry out contractual responsibilities. It should be clear from the Board's findings below that Petitioner initially punished these stewards for their alleged failure to take "aggressive actions" to convince these strikers to return to work. To the extent that Petitioner has relied upon such an implicit obligation, such reliance is grossly misplaced. As this Court recently emphasized:

> "In the 1947 Taft-Hartley Act Congress sought to promote numerous policies. One policy of particular importance — if not the overriding one — was the policy of free collective bargaining . . . And to make crystal clear the intention to leave the parties entirely free of any government compulsion to agree to a proposal, or even reach an agreement, Congress added §8(d) defining 'to bargain collectively' as 'not (to) compel either party to agree to a proposal or require the making of a concession. It follows that the parties' agreement primarily determines their relationship . . . If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution."

Carbon Fuel Co. v. *United Mine Workers of America,* 424 U.S. 212, 100 S.Ct. 410, 414-415 (1979) While a union may agree to assume a greater responsibility for ending illegal strikes by incorporating contractual language requiring officers and stewards to take aggressive steps to end stoppages, that obligation has not been negotiated here and no greater liability or obligation for union officers can be imposed by judicial implication without doing violence to the bargaining process and the national policy furthering free collective bargaining. *Carbon Fuel Co.* v. *United Mine Workers of America, supra.*

In *USWA* v. *Lorain, Division of Koehring Company*, 88 LC 8861, 103 LRRM 2627 (6th Cir. 1980) the

Sixth Circuit reasoned, in interpreting Section 301 of the Labor-Management Relations Act, that:

> "It is impossible to apply the concepts of ratification, authorization, or participation without comprehending the peculiar role which unions play in labor relations. It is not the union's role to act as an agent of the employer, to perform act the employer requires, but to be the representative of its members."

This Court has recently declined to review this well reasoned approach (Docket No. 80-56, May 26, 1981), and for these same reasons, a higher standard of personal responsibility and liability cannot be judically imposed upon Union Stewards under Section 151 *et seq.* of this same Act. To do so would be to revive, in a more insidious form, one far more destructive of statutorily protected rights, the type of implied responsibilities and obligations for unions and their representatives that the Supreme Court unanimously rejected in *Carbon Fuel Co.* v. *UMWA, supra.*

Having discarded the pretexts, shifting rationalizations and factually baseless accusations against the three stewards who are the subject of this Petition, the Board and the Court below had no choice but to find that Westinghouse's motivation in taking this harsher disciplinary action was based solely upon a previously demonstrated desire to retaliate against these Union representatives for seeking to carry out their legal and contractual obligations, and to fundamentally undermine the Union. The decisions of the Board and the Court of Appeals for the District of Columbia Circuit that Section 8(a)(1) and (3) of the NLRA was violated by this flagrantly discriminatory and inherently destructive disciplinary action was based upon substantial factual evidence and is not worthy of review by this Court.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 80-1635

FILED

JUN 1 198

ALEXANDER L. STE

In the Supreme Court of the United States

OCTOBER TERM, 1980

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence suports the Board's finding that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by singling out for disparate disciplinary treatment three employees solely because they held union office.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2a-8a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 9a-33a) are reported at 243 N.L.R.B. No. 44.

JURISDICTION

The order of the court of appeals was issued on December 5, 1980. Petitioner's petition for rehearing and suggestion for rehearing en banc were denied on January 14, 1981 (Pet. App. 34a, 35a). The petition for a writ of certiorari was filed on March 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act is set forth at Pet. 7

STATEMENT

1. On November 3, 1977, Division Steward Slonaker—the ranking representative of the Union[1] at petitioner's Glassport, Pennsylvania plant—learned that petitioner's officials intended to discipline an employee for her assertedly "poor workmanship." Relying on petitioner's consistent past practice of permitting division stewards to attend employee disciplinary sessions, Slonaker asked Supervisor Readal to "let [him] know" when petitioner decided what disciplinary action would be taken. Readal ignored Slonaker's request for notice of the adverse action, held the disciplinary session in Slonaker's absence, and suspended the employee for three days. When Slonaker learned of the meeting and attempted to attend, Readal asserted that the matter was "none of [Slonaker's] business" and directed him to "get the hell out of here." (Pet. App. 15a-18a.)

The following morning, Slonaker asked Readal for contractually-guaranteed time off from his job as a company welder in order to prepare a grievance concerning the disciplinary action imposed on the employee.[2] Readal denied Slonaker's request—suggesting that one of Slonaker's subordinates could handle the matter—and directed

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[1]The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC (Pet. App. 15a).

[2]Under the terms of petitioner's collective-bargaining agreement with the Union, upon request, stewards are permitted time off in order to deal with such matters, unless the steward's absence would cause "serious interference with operations," in which case company officials are nevertheless required to "make arrangements" for the steward to leave his job "as promptly as possible." In addition, the agreement requires the Union to reimburse petitioner for the steward's time away from his job. (Pet. App. 18a-19a, 20a n.13.)

Slonaker to begin work on a project for a specified customer.[3] Invoking his contractual right to a "prompt[]" replacement (see note 2, *supra*), Slonaker asked if Readal would make arrangements to have another welder take his place. Readal responded by directing Slonaker to "stay on [his] job" and stated that he would replace Slonaker when he "s[aw] fit." No effort to secure a replacement was made, and, when Slonaker attempted to assist his subordinates in preparing the grievance, he was threatened with "indefinite[]" suspension unless he returned to work. (Pet. App. 20a-21a; Tr. 1016-1017, 1177-1178.)[4]

Rumors circulated among petitioner's other first-shift employees regarding the suspension, Slonaker's expulsion from the disciplinary meeting, and petitioner's refusal to grant Slonaker time off to process the grievance. The employees met on the company parking lot during their lunch break. As they assembled, the employees began "shouting and hollering" and demanded an explanation of what had occurred. First-shift Stewards Pierce and Kurta attempted to quiet them down, and Slonaker began to explain the events of the preceding 24 hours. The employees repeatedly interrupted him with strident profanity and statements denouncing petitioner's treatment of their stewards. When Slonaker finished his account, several employees declared their intention not to return to work. Slonaker announced that the stewards were returning to the plant, and he, Pierce, and Kurta proceeded to do so. This angered

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[3]Petitioner states (Pet. 8) that Slonaker's assignment was made on an "emergency" basis. The administrative law judge found (Pet. App. 19a & nn.10-12, 22a n.14), however, that petitioner had received the job order in question five days before Slonaker's request and that petitioner had manifested "no sense of urgency" with respect to the project until Slonaker requested time off to prepare the grievance.

[4]"Tr." refers to the transcript of the hearing before the administrative law judge; "GCX" refers to the exhibits of the General Counsel.

the assembled employees, who remained in the parking lot and "vociferously protested" the action of the three stewards as they left. (Pet. App. 23a; Tr. 432-433, 614-616, 833.)

The stewards returned to the plant "ready to go to work"[5] and encountered Supervisor Anderson. Kurta told Anderson that the stewards "would like to get a meeting with management, to resolve this problem, and get the people back into the building." Anderson left and returned a few minutes later, informing the stewards that petitioner's plant manager "would not hold no meeting until the people come back to work." Company officials subsequently told the stewards that they had "a responsibility to get the people back to work." When Slonaker explained that he had "tried" to get the employees to return, but was "unable to do so," Supervisor Gilson derided the stewards and directed them to vacate the building if they did not "intend to go back to work." The stewards departed, and, by the time they reached the parking lot, virtually all of the first-shift employees had left petitioner's premises. (Pet. App. 23a-24a; Tr. 633, 784-785.)

Supervisor Gilson reported to petitioner's plant manager that Slonaker had said that he had unsuccessfully "tried to get the employees back to work," but Gilson added that he thought that Slonaker and two rank-and-file employees (Murelli and Hutzler) had instigated the work stoppage (Pet. App. 24a). On the basis of this information, the plant manager decided to give one-day disciplinary suspensions to Murelli, Hutzler, and the rest of the rank and file, and three-day suspensions to Slonaker, Pierce, and Kurta—as well as to second-shift Stewards Shaver and Caputo and

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[5]Petitioner states (Pet. 9) that "[t]heir only purpose in returning was to confront management over the strike and to present the [employee] grievance * * *"; there is no record support for this assertion.

former Steward Piccini; Shaver, Caputo, and Piccini had not been present at the noon meeting (Pet. App. 15a, 24a-27a).

Shaver, who was on a "road job" about 50 miles from petitioner's plant, learned later that afternoon from his supervisor that the first-shift employees were engaged in a work stoppage. Nevertheless, Shaver and the other "road job" employees continued to work and finished their assigned shift (Pet. App. 25a). Steward Caputo had become ill at the end of his shift the previous evening and had made arrangements with company officials to take the following day off. At the time of the work stoppage, he was sick at home, about 17 miles from petitioner's plant. (Pet. App. 26a-27a & n.30.) Prior to his decision to give them three-day suspensions, the plant manager was informed that Shaver had continued work and that Caputo was at home ill (Pet. App. 25a-26a, 27a).

Employee Piccini had served as third-shift section steward, but had ceased to hold union office when that shift was abolished.[6] By the beginning of the second shift on the day of the work stoppage, Piccini and a majority of petitioner's second-shift employees were assembled in the parking lot. In the absence of the second-shift stewards,[7] the employees collectively agreed that they would not report to work that afternoon. In response, the plant manager decided to suspend each of the second-shift employees for one day, but gave Piccini a three-day furlough. When Piccini called the plant to determine why he had received a longer suspension than the other rank and file employees, a company official explained that "all the stewards got them." Piccini protested that he was no longer a steward, but the

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[6]The record does not indicate whether petitioner was ever formally apprised of this fact (Pet. App. 26a).

[7]As noted above, Steward Shaver was working on a "road job" and Steward Caputo was at home ill.

plant manager "just wouldn't listen" and refused to alter the punishment. (Pet. App. 26a.)

2. The administrative law judge found (Pet. App. 28a) that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by imposing disparate disciplinary treatment upon the six individuals who were, or were believed to be, union stewards.[8] With respect to this finding, petitioner contended (Pet. App. 27a) that the disparate treatment was justified because the stewards had "instigated and condoned the strike" and because they had failed to "assume leadership roles and take aggressive steps to prevent illegal work stoppages." The judge rejected (*ibid.*) this claim, noting that the only information the plant manager had concerning the "instigators" was that Slonaker, Murelli, and Hutzler were possible culprits and that Slonaker had said that he had attempted to prevent the strike. Petitioner's treatment of Slonaker and the five other individuals, who had not been identified as "instigators" at all, thus belied petitioner's claim. The judge concluded (Pet. App. 27a-28a) that the discipline of Shaver (who worked his full shift on the day of the strike) and Caputo (who was at home ill) made it "obvious" that the "sole reason" for the disciplinary action against the six discriminatees was the fact that they held—or were thought to hold—union office. Finally, the judge rejected (Pet. App. 28a) petitioner's argument that the disparate treatment was justified, in any event, because the

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[8]The administrative law judge also found (Pet. App. 18a, 22a) that petitioner violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5), by unilaterally changing its settled practice of permitting division stewards to attend employee disciplinary meetings and by refusing, in violation of its collective-bargaining agreement with the Union, to give Slonaker time off in order to process a grievance. The Board (Pet. App. 9a-10a) and the court of appeals (Pet. App. 3a) sustained these findings. Petitioner raises no issue with respect to them here (Pet. 9-10 nn.2-4).

stewards were bound by their union office to "assume leadership roles and take aggressive steps to prevent a work stoppage," citing the Board's decision in *Precision Castings Co., Division of Aurora Corp.*, 233 N.L.R.B. 183 (1977).[9]

The Board sustained (Pet. App. 9a-10a & n.3) the judge's findings of fact, agreeing that the six discriminatees received harsher penalties "solely because they held the position of steward."[10] The Board rejected (Pet. App. 10a n.3) as a pretext petitioner's claim that the disparate treatment "was based on [the] alleged failure by the stewards to urge other employees to return to work,[11]" pointing out that petitioner had "meted out severer discipline to stewards who were not even present at the plant during the work stoppage and that the other stewards "made a good-faith effort to get the striking employees to return to work." Accordingly, the Board concluded that petitioner had violated Section 8(a)(1) and (3) of the Act, and ordered petitioner, *inter alia*, to make the six discriminatees whole for any loss of earnings they suffered on account of the disparate treatment (Pet. App. 9a-10a, 28a, 30a-31a).

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[9]In *Precision Castings*, the Board held that disparate treatment of a union steward based upon an assertedly higher degree of contractual accountability constitutes—as a matter of law—discrimination on the basis of holding union office and thus violates Section 8(a)(1) and (3) of the Act.

[10]The Board also noted (Pet. App. 10 n.3) that Piccini was given more severe discipline solely because petitioner "believed" he was a steward.

[11]All four members concurred in this factual finding. Chairman Fanning and Member Jenkins also rejected (Pet. App. 10a n.3) petitioner's contention as a matter of law, citing *Precision Castings, supra*. Members Penello and Truesdale, however, concurred (Pet. App. 10a n.3) only in the finding of pretext and expressly disclaimed any reliance on *Precision Castings*. Accordingly, the rationale of that case (see note 9, *supra*) did not command a Board majority here, and the Board did not seek enforcement of its order on that ground in the court of appeals (Br. 26 n.21).

3. A divided court of appeals found (Pet. App. 3a) the Board's conclusion "supported by substantial evidence in the record taken as a whole" and issued (Pet. App. 2a-3a) a per curiam order, enforcing the Board's order in full.[12]

ARGUMENT

Petitioner asks the Court to grant certiorari in order to determine whether, contrary to the rule adopted by the Board in *Precision Castings* (see note 9, *supra*), "stronger discipline may be imposed on union officials for participating in an unlawful strike than is imposed on other striking employees" (Pet. 12).[13] That question is not presented on this record.

The plant manager testified (Pet. App. 27a) that he imposed longer suspensions on the stewards because they had "instigated and condoned the strike" and because they had failed to "assume leadership roles and take aggressive steps to prevent illegal work stoppages." The Board rejected (Pet. App. 10a n.3, 27a) those contentions as pretextual, and found that the "sole" reason for the more severe discipline was that the discriminatees held, or were thought to hold, union office. Moreover, two of the four members of

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[12]Judge McKinnon agreed (Pet. App. 6a) that the disparate treatment accorded to Shaver, Caputo, and Piccini was "improper," but concluded (*ibid.*) that Slonaker, Pierce, and Kurta could lawfully be "held to a higher standard and punished more severely than * * * a rank and file employee" because they had "voluntarily participated" in the work stoppage while holding union office. But see note 15, *infra*.

Petitioner seeks review only of that part of the court's order concerning the discipline of the three first-shift stewards—Slonaker, Pierce, and Kurta (Pet. 9 n.2, 10 n.4).

[13]Although petitioner characterizes the strike in this case as "unlawful," it was not prohibited by law. Rather, petitioner alleged that the strike was not protected by Section 7 of the Act, 29 U.S.C. 157, because it violated a no-strike agreement between petitioner and the Union. Since the General Counsel had not raised any question as to the nature of the strike, the Board did not decide whether the strike was in fact unprotected by the Act (Pet. App. 28a n.31).

the Board expressly disclaimed reliance on *Precision Castings* (see note 11, *supra*), and therefore the holding in that case is not at issue here. Accordingly, the only issue raised by the holding of the court of appeals is whether substantial evidence supports the Board's finding that three of the stewards—Slonaker, Pierce and Kurta—were disciplined more severely solely because they held union office.[14] Such a fact-bound issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the evidence fully supports the Board's finding. As the record shows, Slonaker, Pierce, and Kurta in fact acted in good faith and attempted to *avert* the impending work stoppage.[15] Thus, when the first-shift employees expressed their intention not to return to work after the parking-lot meeting, Slonaker announced that he, Pierce, and Kurta were returning to the plant, and—notwithstanding the barrage of expletives—proceeded to do so. Indeed, before the plant manager decided to impose the disparate treatment upon these three, he had been informed by Supervisor Anderson that they had returned to the building and asked to meet with him "to resolve this problem, and get the people back into the building" (Pet. App. 23a)—a suggestion the plant manager summarily rejected. Moreover, the plant manager had also been informed by Supervisor Gilson that Slonaker *had* unsuccessfully "tried to get the employees back to work" (Pet. App. 24a). These facts—as well as the treatment accorded to the two stewards (Shaver and Caputo) who were not even present at the time of the strike—clearly support the

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[14]Petitioner has abandoned its challenge to the Board's finding with respect to the other three discriminatees (see note 12, *supra*).

[15]Indeed, Members Penello and Truesdale specifically found that they did not even "voluntarily" participate in the strike (Pet. App. 10a n.3).

Board's finding that Slonaker, Pierce, and Kurta were more severely disciplined *solely* because they held union office in violation of Section 8(a)(1) and (3). See generally *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34-35 (1967).

Contrary to petitioner's assertion (Pet. 12-17), the court of appeals' decision enforcing the Board's order with respect to Slonaker, Kurta, and Pierce does not conflict with the decision of any other circuit. The cases petitioner cites permit disparate treatment of stewards who "induce" or "foment[]" unprotected strikes (*NLRB* v. *Armour-Dial, Inc.*, 638 F. 2d 51, 56 (8th Cir. 1981)), who fail to comply with express contractual commands to take "positive steps" to terminate such strikes (*Gould Inc.* v. *NLRB*, 612 F. 2d 728, 730, 733 (3d Cir. 1979)), or who voluntarily join other employees in such strikes and thus do not discharge their assertedly "higher responsibility" to management as union officials (*Indiana & Michigan Electric Co.* v. *NLRB*, 599 F. 2d 227, 230 (7th Cir. 1979)). As shown above, however, the Board found, and the court below agreed, that Slonaker, Kurta, and Pierce were disciplined more severely, not for instigating the work stoppage here or for failing to discharge any "higher responsibility" owed by union officials,[16] but merely because they held union office. Nothing in the cases relied on by petitioner sanctions disparate treatment for that reason, which would necessarily discourage participation in union activities as officers. See *NLRB* v. *Armour-Dial, Inc., supra*, 638 F. 2d at 54-55 ("It is axiomatic that an employer may not discipline an employee merely because he or she holds a union office"); see also *NLRB* v. *Great Dane Trailers, supra*, 388 U.S. at 34 ("the

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[16]The no-strike clause in petitioner's collective-bargaining agreement with the Union contains no provision requiring union officials to take "positive steps" to end a strike (GCX 16, at 4).

burden is upon the employer to establish that [the discriminatory action] was motivated by legitimate objectives"); *Indiana & Michigan Electric* v. *NLRB, supra,* 599 F. 2d at 230 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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